APPENDIX

NOV 29 1973

MICHAEL RODAK, JR., C

In The

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1517

GEORGIA THERESA GILMORE, GUSSIE CARLTON, SYLVIA JOHNSON, J.C. SMITH, MATTIE CARGILL, FRED HARRIS, GEORGE STEPHENS, ELIZABETH BROWN, on behalf of themselves and all others similarly situated,

Petitioners,

-v.-

CITY OF MONTGOMERY, ALABAMA, a Municipal Corporation; BOARD OF COMMISSIONERS OF THE CITY OF MONTGOMERY; JIM ROBINSON, CLIFF EVANS and J.B. RUCKER, as Members of the Board of Commissioners of the City of Montgomery; RECREATION BOARD OF THE CITY OF MONTGOMERY; RUFUS A. LEWIS, JEAN B. CAMPBELL, JAMES HALL, MUREAL R. CRUMP, CHARLES STAKELY, CHARLES W. ROSS and JAMES E. VICE, JR., as Members of the Recreation Board of the City of Montgomery; HENRY M. ANDREWS, as Superintendent of the Parks and Recreational Program for the City of Montgomery, Alabama,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 10, 1973
CERTIORARI GRANTED October 15, 1973

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CIVIL DOCKET

UNITED STATES DISTRICT COURT

No. 1490-N

GEORGIA THERESA GILMORE, GUSSIE CARLTON, SYLVIA JOHNSON, J. C. SMITH, MATTIE CARGILL, FRED HARRIS, GEORGE STEPHENS, ELIZABETH BROWN:
On behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

CITY OF MONTGOMERY, ALABAMA, a Municipal Corporation; BOARD OF COMMISSIONERS OF THE CITY OF MONTGOMERY: JIM ROBINSON, CLIFF EVANS and J. B. RUCKER, as Members of the Board of Commissioners of the City of Montgomery; RECREATION BOARD OF THE CITY OF MONTGOMERY: RUFUS A. LEWIS, JEAN B. CAMPBELL, JAMES HALL, MUREAL R. CRUMP, CHARLES STAKELY, CHARLES W. ROSS, and JAMES E. VICE, JR., as Members of the Recreation Board of the City of Montgomery; HENRY M. ANDREWS, as Superintendent of the Parks and Recreational Program for the City of Montgomery, Alabama,

Defendants.

For Plaintiff:

Solomon S. Seay, Jr.
352 Dexter Avenue
Montgomery, Alabama

Morris Dees & Joseph J. Levin, Jr.
125 Washington Avenue
Montgomery, Alabama

For Defendants:

Hill, Robison, Belser, Brewer & Phelps
P. O. Box 901
Montgomery, Alabama

Walter J. Knabe
P. O. Box 2069
Montgomery, Alabama

Drayton Hamilton
26 S. Perry Street
Montgomery, Alabama 36104

DATE	PROCEEDINGS
12-22-58	Complaint filed and summons issued
1- 9-59	Motion to dismiss by all defendants except Mrs. James Fitts Hill. Notice by all defendants except Mrs. James Fitts Hill of their intention to take the depositions of Georgia Theresa Gilmore, Gussie Carlton, Sylvia Johnson, J. C. Smith, Mattie Cargill, Fred Harris, George Stephens, Elizabeth Brown and Solomon S. Seay, Jr.
1-15-59	Marshal's return on summons and complaint Executed 12-22-58, served City of Montgomery, Ala., and Board of Commissioners of the City of Montgomery, Ala.,

by serving a copy for each on Mayor W. A. Gayle; served Park and Recreation Board of City of Montgomery, Ala., by serving copy on Jack Hope; personal service on Florian Strassburger; personal service on Father M. J. Rafferty; Board of Commissioners of the City of Montgomery, Ala., by serving a copy on Clyde Sellers; personal service on T. A. Belser; Board of Commissioners of the City of Montgomery, Ala., by serving a copy on Frank W. Parks; personal service on W. A. Gayle; Executed 12/23/58 by personal service on Rev. Louis Armstrong; Executed 1/13/59 by personal service on Mrs. James Fitts Hill, Individually and as Chairman of Park and Recreation Board of the City of Montgomery, Ala.

1-28-59 Motion to Mrs. James Fitts Hill, Defendant, to dismiss

2- 3-59 Notice of defendants that they desire to orally argue motions set for hearing 2/4/59 and they may desire to adduce testimony

2- 4-59 Order denying defendants' motions filed on 1/9/59 and 1/28/59 to dismiss

2- 6-59 Depositions of Georgia Theresa Gilmore, Gussie Carlton, Sylvia Johnson, J. C. Smith, Mattie Cargill, Fred Harris, George Stephens, and Elizabeth Brown

2- 9-59 Defendants' motion to stay proceedings

" Order overruling and denying defendants' motion to stay

2-17-59 Defendants' answer to complaint

4- 3-59 Plaintiffs' motion for summary judgment

4-24-59 Plaintiff's application for leave to correct citation

4-24-59 Plaintiff's memorandum brief in support of motion for summary judgment

5- 4-59 Order granting plaintiff's motion to correct motion for summary judgment, or to amend said motion

7-21-59 Order overruling and denying plaintiffs' motion for summary judgment and setting case for trial commencing September 8, 1959, at 10:00 a.m.

9- 9-59 Memorandum Opinion

" Judgment - Order that Ordinance 21-57 of the City of Montgomery, Code of the City of Montgomery, Alabama is unconstitutional and void; further order that the custom of denying negroes the use of the parks in Montgomery is unconstitutional and void - permanent Injunction

" Writ of Injunction issue

9-29-59 Defendants notice of appeal to United States Circuit Court of Appeals

9-29-59 Appeal bond in the sum of $250.00

10-13-59 Marshal's return on Writ of Injunction - Executed 9/11/59 by personal service on W. A. Gayle, Frank W. Parks, Father

M. J. Rafferty, Florian Strassburger, Jack Hope, T. A. Belser, Earl D. James, Rev. Louis Armstrong, and Clyde Sellers, served a copy on W. A. Gayle for the City of Montgomery and for the Board of Commissioners of the City of Montgomery, on L. B. Sullivan; on 10/12/59 by personal service on Mrs. James Fitts Hill and on Park and Recreational Board of the City of Montgomery by handing a copy to Mrs. James Fitts Hill

10-22-59 Court Reporter's Transcript of hearing on September 8, 1959.

10-28-59 Stipulation of counsel as to record on appeal

11- 4-59 Transcript of record on appeal forwarded to the Clerk, U. S. Court of Appeals

5-16-60 Judgment from the Court of Appeals, Fifth Circuit, modifying judgment of District Court in accordance with the opinion of the Circuit Court and affirming judgment of District Court so modified.

5-18-60 Order that this Court will and does retain jurisdiction of this cause until further order; further ORDER that the original judgment herein entered on 9/9/59, and the matters set out in the Memorandum Opinion entered herein on the same date are unchanged and without modification except as set out above.

4-22-64 Order closing case without prejudice to any party petitioning this Court for a reinstatement.

8/7/70 Plaintiffs' motion to cite defendants for contempt and for relief

8/12/70 ORDER that defendants file written response to plaintiffs' motion within twenty days from the date of this order. (copies mailed counsel; certified copies delivered to Marshal, along with copy of motion, for service on defendants.)

8/13/70 Marshal's return of service of motion filed 8/7/70 and order of 8/12/70. Service on August 12, 1970, on Cliff Evans, Montgomery City Commissioners, John B. Rucker, Montgomery City Commissioner, City of Montgomery, Alabama, Earl James, Mayor, Henry Andrews, Supt. of Parks & Recreation Board, Parks and Recreation Board, Mureal Crump, Chairman, Parks and Recreation Board, and Florian Strassburger, Rev. Louis Armstrong, Margaret McFall, and James E. Vice, Members of Parks and Recreation Board.

8/13/70 Defendants' answer to motion of 8/7/70.

9/1/70 ORDER setting this cause for trial at 9:30a.m., Oct. 16, 1970. (Copies mailed to counsel.)

1970

Sept. 9 Plaintiffs' notice of taking the depositions of William Lloyd Brannon, Mayor Earl James; Lynn Bozeman; Florian Strassburger; Henry M. Andrews, Jr., and J. Aronstein.

9 Plaintiffs' amendment to their motion filed Aug. 7, 1970.

18 Plaintiffs' motion for restraining order.

18 Plaintiffs' correction to their amendment to motion filed on Sept. 9, 1970.

23 ORDER that the trial of this cause, heretofore scheduled for October 16, 1970, be rescheduled for October 23, 1970, at 9:30 a.m. (Copies mailed to counsel.)

Oct. 1 Plaintiffs' motion for continuance.

1 Plaintiffs' "Motion to Treat Plaintiffs' 'Motion for Relief filed August 7, 1970' as an Amendment to Original Complaint."

2 ORDER that the trial of the cause, presently scheduled for October 23, 1970, be rescheduled for November 20, 1970, at 9:30 a.m., Montg., Ala. (Copies mailed to counsel.)

2 ORDER granting plaintiffs' motion filed 10/1/70 asking this Court to treat plaintiffs' motion for relief filed 8/7/70, as an amendment to plaintiffs' complaint. (Copies mailed to counsel.)

8 Depositions of William L. Brannon, Mayor Earl D. James, Florian A. Straussburger, Durwood Lynn Bozeman, and Henry M. Andrews.

14 Plaintiffs' notice of taking the depositions of Joe Marshall and Allyn McKeen.

14 Plaintiffs' request for ruling on motion.

15 Response of City of Montgomery to request for ruling on amendment as filed by the plaintiffs.

19 ORDER that all claims by plaintiffs in this case with reference to the following proposed recreational facilities be dismissed:
Billingslea School - Joint School, Park and Recreation Facility
Hale School - Joint School, Park and Recreation Facility
Westwood-Westgate - Park and Recreation Facility Only
G.W. Smiley Development - Park and Recreation Facility Only
Hayneville Sch. Dist. - Park and Recreation Facility Only
Old Selma Road - Park and Recreation Facility Only
Terminal Road - Park and Recreation Facility Only
Bruce Tennis Complex (otherwise known as Bruce Field)
(Copies mailed to counsel.)

29 Depositions of Joseph E. Marshall and Allyn McKeen, with exhibits.

Nov. 10 ORDER on pretrial hearing. Issues in controversy set out. (Copies mailed to counsel.)

20 Plaintiffs' offer of evidence and request for judicial notice.

Dec. 30 ORDER that the continuation of the hearing on the merits of this case, heretofore scheduled for January 18, 1971, is rescheduled to commence at 9:30 a.m., February 10, 1971. (Copies mailed to counsel.)

1971

Jan. 29 Joint plan of parties.

29 ORDER approving, accepting, and by reference adopting and making a part of this judgment the plan (which disposes of all issues involved in this litigation) filed this date by the parties. Defendants ordered to file written reports on implementation of plan 6 months from date of this order and every 6 months thereafter until further order. Costs taxed against defendants. (Copies mailed to counsel.) Jurisdiction specifically retained.

Feb. 5 Stipulation of parties to withdraw evidence.

5 ORDER granting motion to withdraw certain items of evidence. (Copies mailed to counsel.)

Mar. 24 Court Reporter's excerpt transcript from hearing of Nov. 20, 1970.

26 Received costs bill in the amount of $3,618.74 from plaintiffs' attorney.

Apr. 8 Costs in amount of $3,618.74 taxed against defendants per costs bill received. (Copies mailed to counsel.)

May 6 Court Reporter's excerpt transcript of testimony of William Chandler from hearing of Nov. 20, 1970.

July 29 Defendants' progress report filed in accordance with order of 1/29/71.

Sept. 8 Plaintiffs' motion for supplemental relief

8 Plaintiffs' motion for temporary restraining order

8 Plaintiffs' motion for preliminary injunction

9 ORDER to show cause. Order denying plaintiffs' motion for a temporary restraining order enjoining defendants, without notice to said defendants and without an opportunity for said defendants to be heard. Defendants shall show cause within 10 days from this date why plaintiffs' motion for a preliminary injunction should not be advanced on the calendar of this Court and given precedence over all matters except those of a similar nature. (Copies mailed to counsel.)

14 Plaintiffs' motion to expedite time for answering interrogatories

14 Plaintiffs' interrogatories to defendant Henry M. Andrews, Jr.

14 ORDER granting plaintiffs' motion to shorten the time within which defendants are to answer interrogatories. Defendants allowed 15 days from this date to file responses to said interrogatories. (Copies mailed to counsel.)

20 Answer of defendants to show cause order of 9/9/71

21 ORDER setting plaintiffs' motion for supplemental relief for hearing on its

merits at 9 a.m., 12/1/71, in U.S. District Courtroom, 2nd Floor, Federal Building, Montgomery, Ala. Further ordered that (1) the defendants file within 20 days from this date responsive pleading to plaintiffs' motion; (2) each party furnish counsel for opposing party on or before 11/18/71, the names and addresses of witnesses to be used and for copying and inspection, all documents that are to be offered in evidence; (3) all discovery in connection with plaintiffs' motion and the hearing to be conducted be completed by 11/23/71; and (4) the parties file their briefs on or before 11/29/71. (Copies mailed to counsel.)

29 Answers of defendant Henry M. Andrews to interrogatories

Oct. 4 Plaintiffs' notice of taking deposition of Henry M. Andrews.

12 Response of defendants to plaintiffs' motion for supplemental relief

Dec. 1 Defendants' motion for substitution of parties defendant

1 Parties agreement for submission of case

1972

Jan. 17 ORDER of Substitution. Jim Robinson, Cliff Evans and J. B. Rucker are substituted as party defendants and as members of the Board of Commissioners of the City of Montgomery for W. A. Gayle, Frank W. Parks and Clyde C. Sellers.

Rufus A. Lewis, Jean B. Campbell, James Hall, Mureal R. Crump, Charles W. Ross, and James E. Vice, Jr. are substituted as party defendants and as members of the Recreation Board of the City of Montgomery (formerly the Park and Recreation Board of the City of Montgomery) for Mrs. James Fitts Hill, Father M. J. Rafferty, Rev. Louis Armstrong, Florian Strassburger and Jack Hope. Henry M. Andrews is substituted as a party defendant and as Superintendent of the Parks and Recreational Program for the City of Montgomery, Alabama, for T. A. Belser. (Copies mailed to counsel and substituted defendants.)

18 ORDER (1) declaring the City of Montgomery, Alabama's policy and practice of permitting the use of city owned or operated recreational facilities by any private school, or private school affiliated group, which school or group is racially segregated or which has a racially discriminatory admissions policy unconstitutional; (2) enjoining said City of Montgomery, Alabama, its officers, agents, etc. from permitting or in any way sanctioning the use of city owned or operated recreational facilities by any private school, or private school affiliated group, if such school or group is racially segregated or if it has a racially discriminatory admissions policy; (3) declaring said City of Montgomery, Alabama's policy and practice of permitting the use of city owned or operated recreational facilities by any private group, club or organization which has a racially discriminatory

admissions policy unconstitutional; (4) enjoining said City of Montgomery, Alabama, its officers, etc. from permitting or in any way sanctioning the use of city owned or operated recreational facilities by any private group, club or organization which is not affiliated with a private school and which has a racially discriminatory admissions policy. Costs taxed against defendants.

18 Writ of injunction issued. Copies of writ of injunction and order mailed by certified mail (return receipt requested) to Charles Stakely, J. B. Rucker, Cliff Evans, Jim Robinson, Henry M. Andrews, Mureal R. Crump, Jean B. Campbell, Charles W. Ross, James E. Vice, Jr., Rufus A. Lewis, and James Hall. Copies of writ and order by regular mail to Morris Dees and Joseph J. Levin, Jr.,; Gray, Seay & Langford; Walter Knabe; Drayton Hamilton; copies handed to Joseph D. Phelps

31 Defedants' report as to the progress made toward implementing the provisions of the order entered 1/18/72.

Feb. 11 Defendants' notice of appeal to U. S. Court of Appeals, 5th Circuit from the order entered in this Court 1/18/72. (Copies of notice mailed to Edward W. Wadsworth, Clerk, U. S. Court of Appeals; Morris Dees and Joseph J. Levin; Gray, Seay & Langford; Walter Knabe; Drayton Hamilton.)

11 Bond for costs on appeal ($250 cash)

March 15 Defendants' designation of parts of record to be included in appendix

15 Defendants' motion for stay pending appeal

16 ORDER staying that part of the decree entered 1/18/72, reading as follows: "That said City of Montgomery, Alabama, its officers, agents, servants, employees and those acting in concert with it, be and each is hereby enjoined from permitting or in any way sanctioning the use of city owned or operated recreational facilities by any private group, club or organization which is not affiliated with a private school and which has a racially discriminatory admissions policy." All other provisions in said decree shall remain in force and effect. (Copies mailed to counsel.)

21 Clerk's certificate as to record

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

GEORGIA THERESA GILMORE, GUSSIE CARLTON, SYLVIA JOHNSON, J. C. SMITH, MATTIE GARGILL, FRED HARRIS, GEORGE STEPHENS, ELIZABETH BROWN, on behalf of themselves and all others similarly situated, Plaintiffs,	CIVIL ACTION NO. 1490-N
vs.	TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION REQUESTED
CITY OF MONTGOMERY, ALABAMA, a Municipal Corporation; BOARD OF COMMISSIONERS OF THE CITY OF MONTGOMERY; W. A. GAYLE, FRANK W. PARKS and CLYDE C. SELLERS, as Members of the Board of Commissioners of the City of Montgomery; PARK AND RECREATION BOARD OF THE CITY OF MONTGOMERY; MRS. JAMES FITTS HALL, FATHER M. J. RAFFERTY, REV. LOUIS ARMSTRONG, FLORIAN STRASSBURGER, and JACK HOPE, as Members of the Park and Recreation Board; T.A. BELSER, as Superintendent of the Parks and Recreation Program of the City of Montgomery, Alabama, Defendants.	Filed Sept. 8, 1971

MOTION FOR SUPPLEMENTAL RELIEF

1. This motion seeks to have the defendants in the above-styled cause temporarily and permanently enjoined from permitting or in any way sanctioning the use of the City recreational facilities by any school, group, or organization which is racially segregated.

2. The City of Montgomery, through its various Athletic and Recreation Boards, owns and operates numerous football facilities, including Crampton Bowl and Goodwyn Community Center football field. These latter two facilities are both well maintained, with excellent physical plants and playing areas and with artificial lights to permit the playing of night games.

3. The costs involved in purchasing, operating and maintaining the City's recreational facilities have been, and continue to be, financed primarily with City revenues. Plaintiffs and the class they represent constitute approximately one-third of the population of the City of Montgomery and thus

contribute significantly, through the taxes paid by them, to the upkeep and maintenance of these facilities.

4. Stephens-Spear School is a private school located in the City of Montgomery. Plaintiffs allege that Stephens-Spear is racially segregated in that only white students are permitted to attend. The administrator of the school, Jimmy Spear, has made this clear in a letter sent by the school to parents of prospective students when he states unequivocally that "This is a private school and will not be integrated." (Exhibit A).

5. Central Alabama Academy is also a private school located in Montgomery. Plaintiff alleges that Central Alabama Academy is also racially segregated in that only white students are permitted to attend.

6. Stephens-Spear and Central Alabama Academy will both field varsity football teams during the 1971-72 academic year. (Exhibit B). Stephens-Spear and Central Alabama belong to

and play only members of the Private School League. (Exhibit C). Plaintiffs allege, upon information and belief, that all the members of the Private School League maintain racially discriminatory admissions policies.

7. The City of Montgomery presently has a practice and policy of permitting any private school or club, even if the school or club is racially segregated, to use available City recreational facilities at little or no cost to the respective school or club. Stephen-Spear's home football games and Central Alabama's home football games are scheduled to be played at night at Goodwyn Community Center's football field. (Exhibit D). Thus, defendants are permitting these racially segregated schools to use the City's facilities, fields, and lights at little or no charge to the schools.

8. Negro residents of the City of Montgomery have for too long a time been unknowingly forced to

subsidize, through their taxes, racially segregated private schools and organizations. This Court has already been confronted with one instance of City funds being used to finance and support a segregated organization. See Smith v. YMCA, 316 F. Supp. 899 (M.D. Ala. 1970). Plaintiffs ask the Court to stop this unconscionable and impermissible practice by declaring that the use of City owned and operated recreational facilities by racially segregated private schools, besides completely frustrating public policy, violates plaintiffs' constitutional rights under the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution.

WHEREFORE PREMISES CONSIDERED, plaintiffs resepctfully pray that this Court:

(a) Enter a judgment declaring the City of Montgomery's policy and practice of permitting the use of City owned and operated recreational facilities by racially segregated private schools and clubs

to be unconstitutional in violation of the Fourteenth Amendment to the United States Constitution.

(b) Issue a Temporary Restraining Order and a Preliminary Injunction restraining defendants from permitting Stephens-Spear School and Central Alabama Academy and any other racially segregated private school from playing on City owned and operated recreational facilities until the merits of this cause can be judicially determined.

(c) Issue a Permanent Injunction against defendants, their officers, agents, servants, and employees, restraining them from allowing or in any way sanctioning the use of City owned and operated recreational facilities by any private school group, club, or organization which is racially segregated or which has a racially discriminatory admissions policy.

(d) Grant such further, different or other relief deemed appropriate by the Court under the circumstances.

LEVIN & DEES
125 Washington Avenue
P. O. Box 2087
Montgomery, Alabama 36103

By: s/ Howard Allyn Mandell
Howard Allyn Mandell

ATTORNEYS FOR PLAINTIFFS

STATE OF ALABAMA)
)
MONTGOMERY COUNTY)

Before me, a Notary Public in and for the State of Alabama at Large, personally appeared Howard Allyn Mandell, who, being duly sworn, deposes and says that the foregoing allegations of fact are true and correct to the best of his information, knowledge and belief.

s/ Howard Allyn Mandell
Howard Allyn Mandell

SWORN TO AND SUBSCRIBED before me
this 8th day of September, 1971.

s/ Becky Ann Logan
Notary Public

- - - - -

EXHIBIT A

STEPHENS-SPEAR SCHOOL
2530 East South Blvd.
P. O. Box 11401
Montgomery, Alabama 36111

Your child's future, as well as his present happiness and success, depends to a large extent upon the quality of his elementary, junior and senior high school program. The purpose of the Stephens-Spear School is to offer a superior scholastic opportunity for its students in grades one through twelve, so that these young people can become more capable, creative, confident, problem-solving, and patriotic young citizens.

LIMITED CLASSROOM ENROLLMENT

The maximum enrollment per class is twenty-five students.

FACULTY AND STAFF

The teachers employed will have appropriate

college degrees and will be certified by the State of Alabama. Some of the finest teachers in Montgomery have already been employed for the 1970-71 school year. The majority of our junior and senior high teachers have their Master's Degree in the subject which they will teach.

The principal, Sarah D. Spear, is a Huntingdon College graduate with a major in elementary teacher education. In addition to having eight years of classroom teaching experience at Flowers Elementary School at Montgomery, she has done graduate study in educational administration and supervision at the University of Alabama and at Auburn University. The educational program of the school will be coordinated by her.

The administrator, Jimmy Spear, is also a Huntingdon graduate with a major in economics. All business matters pertaining to the school will be managed by him.

SCHOOL CALENDAR

We will have our school calendar coincide with that of the public schools. This is for the convenience of families who may have children at other schools.

The school day will begin at 8:30 a.m. and end at 2:50 p.m.

CLASSROOM ORGANIZATION

In the elementary school we offer the graded, self-contained classroom organization. We realize that when one teacher has control of the children for most of the day, more careful guidance of individual progress is possible. Also, the student feels more secure in a situation such as this, and more time is then available for the instructional program. However, for the junior and senior high school, there will be departments, and it will be necessary for students to change classes.

The course of study for the junior and senior

high school will meet the requirements set forth in the Alabama Course of Study. We have, however, used the Alabama Course of Study as our minimum requirements, and we will offer an even more enriched curriculum. We have researched the required units of subjects required by colleges for entrance and will be able to discuss this with you. For further details it will be necessary to contact the school for the junior and senior high subjects are too complex to explain fully in this information bulletin.

STUDENT CONDUCT

We realize discipline is imperative if students are to become effective citizens of a constantly changing society. Our faculty is concerned not only with maintaining good discipline, but also with teaching good discipline, for some day it will be necessary for our students to discipline themselves. We believe students must learn to apprecaite and to understand the reasons for rules and laws and to

realize a citizen's obligation to obey and respect them.

We will attempt to reach the principles of proper democratic conduct simply as a preferred and desirable way of life for the individual, home, school, community, state, and nation.

SCHOOL CAMPUS AND BUILDING

The Stephens-Spear School is located on a four and one-half acre site on the East South Boulevard. Across the street is the beautiful, new Montgomery Mall Shopping Center and Governor's House Motel. In addition to the easily accessible location, there is ample space for playground and recreational facilities.

We believe the quality of a school's plysical facility is one of the strands woven into the fabric of forces shaping the quality of education. It is possible for superior teachers to teach well in spite of handicaps of an inadequate building. But

these same teachers can significantly improve the quality of the educational program when they work in a desirable physical environment.

We have a modern, air-conditioned building which was constructed in 1966. Space is available for seventeen classrooms. library, and cafeteria. Of prime importance to students, faculty and parents, is the fact that the building is rated triple A by the fire insurance rating bureau. A special attraction for the students is a large swimming pool, which is fenced for safety purposes, and a two-acre playground located behind the school.

SCHOOL OWNERSHIP

S and S Corporation owns the Stephens-Spear School. All stock in this corporation is owned by the directors, Erma M. and Marion G. Stephens, and Sarah D. and James R. Spear. This corporation has purchased the building and land and has adequate working capital to finance a sound program of quality education. S and S Corporation

has not and will not use any Federal or State money. This allows us the opportunity to offer your child a sound educational program without governmental regulations.

STUDENT ADMISSION.

Each applicant will be carefully evaluated by the principal before being accepted. This is a private school and will not be integrated.

Applicants for the first grade will be administered a reading readiness test before school opens. Acceptable scores must be made before the student may begin first grade work. If a child who is five years of age should make acceptable scores on the test and, in the opinion of the principal, appears to be ready to begin school, then this student may be admitted.

SCHOOL EXPENSE

Tuition for grades one through nine will be $600, and $690 for grades ten through twelve. If

this amount is paid in full by September 1, a discount of $25 will be allowed. Upon enrollment $150 is payable. This $150 is subtracted from the $600, or $690, and the balance of $450 for grades 1-9, or $540 for grades 10-12, remains. For the convenience of parents, an installment plan may be arranged with payments of $50 per month for grades 1-9, or $60 per month for grades 10-12, for nine months beginning September 1.

In the elementary school reading textbooks will be furnished by the school. The remaining books will be purchased by the student. The exact cost will depend upon the grade level. These books will be sold at the school for your convenience.

LOCATION

The school building is located 2530 East South Boulevard. Until June 10, our temporary office will be at 1120 South Court Street. Office hours are from 9 a.m. until 6 p.m., Monday through Saturday. We

invite you to visit and discuss the school and your child. You may telephone us at 262-0348, or call us at our home at 272-8815.

Transfer Students Backbone Of Stephens-Spear Squad

By ROY THOMAS
Advertiser Sports Writer

"Montgomery football fans are accustomed to a winner, and that is what we at Stephens-Spear expect to give them," said Spartan Head Coach Jimmy Spear.

Spear and assistants John Safer and Mike Douglas are especially excited about senior transfers Ronnie Williams, 182-pounder from South Carolina; Mike Cowen, 150-pound quarterback and defensive halfback from South Montgomery Academy, David Nicholson, 160-pound wide receiver from Denver, Colo.; Barney Mahaffey, 185-pound defensive end from Jeff Davis; Charles Marshall, 185-pound tackle from Jeff Davis, and Tommy Duke, 220-pound tackle from Montgomery Academy.

This is the first season that Stephens-Spear has participated in football after the Alabama Private School Athletic Association came into being last year.

The Spartans have a good nucleus with the six talented transfers to lead their other 17 teammates.

The squad by positions are quarterbacks Ricky Wilson and Cowen, flankers Ronnie Dubose and Johnny McInnis, ends Nicholson, Mahaffey, Russell Savage and Barry Adams, running backs Williams, Robert Martin, Russell Purdy, Don Richardson and Jim Jarvey.

On the line there is center Buddy Vann, guards Jim McKinney, Charles Shaw and Ronnie Wasson, tackles Duke, Marshall, Steve Evans, John Powell, Jack Crysel and Frank Crozier.

All of Stephens-Spear home games will be played at Goodwyn Junior High School.

The Spartans will be big with Duke tipping the scales at 220. Other stout players are Crysel 231, Crozier 200, Powell 197, Williams 183 and Vann 190.

EXHIBIT B

ADVERTISER-JOURNAL
23rd Annual Football Section
Thurs., Sept. 2, 1971

EXHIBIT B

ADVERTISER-JOURNAL
23rd Annual Football Section
Thurs., Sept. 2, 1971

Central Academy to Field First Grid Squad in 1971

Central Alabama Academy will field its first football team ever this year with Coach Steve Jones leading the way for the infant squad.

Jones gets really excited when talking about quarterback Rob Darnell, fullback Bobby Arrant, flanker Trey Holley, tailback John Lachezy and guards Buzzy Stuckey and Mike Dunlap.

Other players on the slim squad are tailback Tim Singleton, quarterback Chuck Lynn, center Tim Stegall, end Jimmy Stuckey, end Dan Lockhart, tackle Randy Brady, tackle David Mullin, tackle Gary Wilson, guard Mike Massey, guard Royce Williams and guard Steve Mosely.

"I think we will have a pretty fair team," said Jones. "We lack depth so a lot of boys will have to play both ways. If we don't have too many injuries we will be all right."

Private School Football Schedule

Private School Football Schedule

EXHIBIT C

ADVERTISER-JOURNAL
Football Section
Thurs. Sept. 2, 1971

SUPPORT THE STEPHENS-SPEAR SPARTANS

1971 FOOTBALL SCHEDULE

Sept. 4 Sat.—Escambia Academy at Atmore.
Sept. 11 Sat.—Edgewood Academy of Wetumpka, home*
Sept. 17 Fri.—West End Academy at Tuscaloosa
Sept. 24 Fri.—Sparta Academy of Evergreen, home*
Oct. 1 Fri.—Union Academy at Dadeville
Oct. 7 Thur.—Central Ala. Academy of Montgomery. Home
Oct. 16 Sat—Autauga Academy, home*
Oct. 23 Sat.—Greenville Academy, home*
Oct. 29 Fri.—Shelby Academy, home*
Nov. 4 Thur.—Perry Academy of Marion, home*

Nicknome: Spartans. School Colors: Blue and Gray

Coaches: Jimmy Spear, Huntingdon College
John Shafer, Auburn University
Mike Douglas, Clemson University

*All home games to be played at 8:00 p.m. at the Goodwyn Community Center football field.

Tickets Are: Adults $1.50. Students $1.00

MOTION FOR TEMPORARY RESTRAINING ORDER

(Number and Title Omitted) (Filed Sep 8, 1971)

Upon the Motion for Supplemental Relief and upon this sworn Motion, Plaintiffs move the Court for a temporary restraining order, restraining the defendants from permitting Stephens-Spear School, Central Alabama Academy, and any other private school which has a racially discriminatory admissions policy from using any City owned and operated football field or facility until such time as the Court has had an opportunity to rule on the merits of this case, and assigns as grounds for said motion the following:

1. The Private School Football League has already begun its 1971-72 football season. Stephens-Spear's first home game is scheduled for Saturday night, September 11, at Goodwyn Community Center football field. Central Alabama Academy's first home football game is scheduled for Thursday night,

September 23, at Goodwyn Community Center football field.

2. This is not the first time the defendants have permitted the City's revenues and facilities to be used by racially segregated private schools and groups. See Smith v. YMCA, supra. Furthermore, these segregated schools and other racially segregated schools and groups will probably request and be allowed to use other City recreational facilities before this cause is decided on the merits by the Court. It is imperative that this unconstitutional practice is terminated before plaintiffs' rights are further violated.

3. The law is so well settled in this area of the law that defendants' conduct is patently unconstitutional. Plaintiffs' Equal Protection and Due Process rights are present and immediate rights and plaintiffs should not be required to suffer further deprivations of their rights while awaiting a ruling from the Court on the merits of the case.

4. Any prejudice or harm to the defendants resulting from the issuance of a Temporary Restraining Order is far outweighed by the irreparable injury which will be suffered by plaintiffs if this motion is denied.

Respectfully submitted,

LEVIN & DEES

By s/ Howard Allyn Mandell
Howard Allyn Mandell

ATTORNEYS FOR PLAINTIFFS

STATE OF ALABAMA)

MONTGOMERY COUNTY)

Before me, a Notary Public in and for the State of Alabama at Large, personally appeared Howard Allyn Mandell, who, being duly sworn, deposes and says that the foregoing allegations of fact are true and correct to the best of his information, knowledge and belief.

s/ Howard Allyn Mandell
Howard Allyn Mandell

SWORN TO AND SUBSCRIBED before me

this 8th day of September, 1971.

s/ Becky Ann Logan
Notary Public

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ORDER TO SHOW CAUSE

(number and Title Omitted) (Filed Sep 9, 1971)

Plaintiffs' motion for a temporary restraining order enjoining the defendants, without notice to said defendants and without an opportunity for said defendants to be heard, is ORDERED to be and the same is hereby denied.

It is further ORDERED that the defendants appear in writing, within ten days from the date of this order, and show cause, if any they have, why plaintiffs' motion for a preliminary injunction should not be advanced on the calendar of this Court and given precedence over all matters except those of a similar nature.

Done, this the 9th day of September, 1971.

s/ Frank M. Johnson, Jr.
UNITED STATES DISTRICT JUDGE

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INTERROGATORIES

(Number and Title Omitted) (Filed Sep 14, 1971)

The plaintiffs request that the defendant Henry M. Andrews, Jr., as Superintendent of the Parks and Recreation Program of the City of Montgomery, answer under oath, in accordance with Rule 33 of the Federal Rules of Civil Procedure, the following interrogatories:

1. For each and every City owned and operated outdoor (a) football, baseball and softball field and (b) tennis and basketball court having artificial lighting, please give the following information:

(a) the approximate cost to the City for installing the lights

(b) the approximate annual cost for upkeep

and maintenance of the lights

(c) the approximate cost to the City for operating the lights per kilowat hour.

2. Please state the Park and Recreation Department's policy with regard to the use of City owned and operated recreational facilities by private (a) schools and (b) organizations.

3. How long has this policy been in effect?

4. Please state whether the Department of Recreation charges a fee for the use of the City's recreational facilities by:

(a) public schools

(b) private schools

(c) private organizations (excluding the YMCA)

5. If the answer to either 4(a), (b), or (c) is yes, please list what those fees are for the following activities:

(a) day football game

(b) night football game (lighted)

(c) day baseball or softball game

(d) night baseball or softball game (lighted)

(e) indoor basketball game.

6. Please list the factors, if any, which the Department of Recreation considers in deciding:

(a) whether to permit a private school use of available City recreational facilities

(b) whether to deny a private school use of available City recreational facilities.

7. Please attach a schedule, for 1970 and 1971, which gives (or if no schedule is available, please list) the following information:

(a) the name of every private school which was permitted by the Department of Recreation to use City recreational facilities;

(b) the particular recreational facility(ies) used by the private school;

(c) the dates on which the facility(ies) were used;

(d) the amount or fee paid by the school for the use of the facility.

8. Please attach a schedule which gives (or if no schedule is available, please list) the following information:

(a) the name of every private school which has requested permission of the Recreation Department to use City recreational facilities during the period from September 1, 1971 through June 1, 1972;

(b) the particular recreational facility sought to be used by the school;

(c) the dates on which the facility(ies) are sought to be used;

(d) the amount or fee paid (or to be paid) by the school.

9. Please state:

(a) which private schools, if any, are now being, or will during the 1971-72 school year be, permitted to hold their team

practices on or in City recreational facilities;

(b) the particular recreational facility now being, or to be, used;

(c) the amount or fee to be paid by the school.

10. Does the Department of Recreation provide any amenities such as sporting equipment, referees and umpires, etc. to (a) public schools (b) private schools using City recreational facilities?

11. If the answer to 10(b) is yes, please state:

(a) what these amenities are;

(b) the approximate value of these amenities over a year period.

12. How long has the Department of Recreation had its present policy with regard to charging (or not charging) private schools for the use of City recreational facilities?

13. Does the Department of Recreation determine the admission fees at (a) public school football

games (b) private school football games played on City recreational facilities?

14. If the answer to 13(a) or (b) is no, by whom are the fees set.

15. What percentage of the gate collected admission fees at a private school football game goes to:

(a) the City of Montgomery

(b) the private school.

LEVIN & DEES
P. O. Box 2087
Montgomery, Alabama 36103

By s/ Howard Allyn Mandell

ATTORNEYS FOR PLAINTIFFS

ANSWER OF DEFENDANTS TO SHOW CAUSE ORDER

(Number and Title Omitted) (Filed Sep 20, 1971)

COME NOW the City of Montgomery, Alabama, a municipal corporation, et al, Defendants in the above entitled cause, pursuant to the Order of this Court

dated September 9, 1971, and show unto the Court that there is no urgent or demanding necessity that the Plaintiff's motion for preliminary injunction be advanced on the calendar of the Court. The Defendants, as grounds for said response, show unto the Court the following:

All of the recreational facilities maintained by the City of Montgomery are operated on a racially non-discriminatory basis. The Defendants show that football fields, baseball and softball facilities and other recreational facilities are made available without racial discrimination by the City of Montgomery to various sotfball and baseball leagues, civic clubs, church groups, schools and other public and private bodies without discrimination on the basis of application being made and the prescribed fees being paid. The applications are handled on a uniform basis and the same fees are charged without regard to race or color.

The Defendants, subject to the Order of this

Court, will file in the course of these proceedings a full and complete answer, which will include the showing that the question of the availability of recreational facilities to the various groups throughout the City was raised by the Plaintiffs in the petition for further relief filed in August, 1970, and was included in the issues settled between the parties in January of 1971.

s/ Walter J. Knabe
Walter J. Knabe

s/ Drayton M. Hamilton
Drayton M. Hamilton

s/ Joseph D. Phelps
Joseph D. Phelps

ATTORNEYS FOR DEFENDANTS

THE STATE OF ALABAMA,

COUNTY OF MONTGOMERY.

Before me, the undersigned Notary Public in and for the State of Alabama at Large, personally appeared Joseph D. Phelps, who is known to me, and who being by me first duly sowrn, doth depose and

say that the foregoing allegations of fact are true and correct to the best of his knowledge, information and belief.

s/ Joseph D. Phelps
Joseph D. Phelps

SWORN TO and subscribed before me this 20th day of September, 1971.

s/ Brenda B. Kirby
Notary Public

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ANSWERS TO INTERROGATORIES

(Number and Title Omitted) (Filed Sep 29, 1971)

COMES NOW the Defendant, Henry M. Andrews, and files the following answers to the Interrogatories heretofore served on him:

1. (a)

Softball and Baseball:

Chisholm	$22,240.44
Carver	11,828.72
Houston Hill	8,253.28

Goodwyn	4,660.00
Cloverdale	11,175.00**
Bellingrath	6,154.00
Capitol City Boys Club	5,379.00
Highland Gardens	3,375.00
Coliseum Blvd Softball	5,479.00

** Combination baseball and football

Football:

Cloverdale (baseball lighting used)	
Goodwyn	6,290.00
Bellingrath	2,069.00

Basketball:

Kings Hill	1,975.00

Tennis:

O'Conner Tennis Complex (Bruce)	25,430.00

(b) No breakdown is available on separate facilities. Overall electrical maintenance for the year September, 1970 to September, 1971 is as follows:

Labor - 300 hours at $6.50 per hour - $1,950.00;

Bulbs - 140, 1500 inca. bl. at $2.70 - $378.00

Bulbs - 36 Quartz at $9.56 - $344.16

(c) $ .045 per kilowatt hour.

2. The Parks and Recreation Department makes all recreational facilities available to the public generally and to organized groups for athletic competition upon application being made and upon the prescribed fee being paid.

3. From inception.

4. (a) No

(b) Yes

(c) Yes

5. (a) No charge made to any group.

(b) Either a fee of from $25.00 to $60.00, depending upon the number of lights, or 5% of the gate, whichever is greater.

(c) No charge made to any group.

(d) No charge made to any group.

(e) No charge made to any group.

6. Whether facility has already been scheduled for time requested, publicly sponsored league events are given preference. All applicants must meet regulations regarding use of facility with regard to: (1) use of alcoholic beverages, and, (2) adequate crowd control.

7. (a), (b), and (c):

(1) St. James Junior High School - Bellingrath football facility, one time during 1970 season; game played in afternoon; no charge.

(2) St. James Junior High School - Cloverdale football facility on September 17, 1971; game played at night; fee of $60.00 paid to City.

(3) See attached Schedule 1.

(d) The fee of from $25.00 to $60.00 or 5% of the gate, whichever is greater, is

charged for all night football games. Facilities report actual amounts taken in at end of season.

8. See Answer to Interrogatory No. 7 above.

9. (a) None

   (b) None

   (c) N/A

10. (a) Junior high school age leagues are operated by the City for the following teams: Baldwin, Bellingrath, Capitol Heights, Carver, Cloverdale, Floyd, Goodwyn, Hayneville Road, Houston Hill, Loveless, McIntyre, and B. T. Washington. In this program, the amount of $500.00 is annually furnished to each team for athletic equipment. Four football umpires are furnished at $8.00 per man for 5 games, and two basketball officials are furnished at $5.00 per man for 10 games. Practice ball is furnished to each team.

(b) No equipment or other amenities furnishe to private schools.

11. See Answer to Interrogatory No. 10 above.

12. From inception.

13. For City Recreation sponsored junior high age group, admission fees are set by the City. All other groups set their own admission fees.

14. See Answer to Interrogatory No. 13 above.

15. Fee of either $25.00 to $60.00, depending upon number of lights is paid to the City. Balance o gate goes to private school.

s/ Henry M. Andrews
HENRY M. ANDREWS

CITY OF MONTGOMERY, ALABAMA

BY: s/ Joseph D. Phelps
ASSISTANT CITY ATTORNEY

THE STATE OF ALABAMA,

COUNTY OF MONTGOMERY.

Before me, the undersigned authority, personall appeared HENRY M. ANDREWS, who is known to me, and

who being by me first duly sworn, doth depose and say, that the facts set forth in the foregoing ANSWERS TO INTERROGATORIES are true and correct to the best of his knowledge, information and belief.

s/ Henry M. Andrews
HENRY M. ANDREWS

SWORN to and subscribed before me
on this 29th day of September, 1971.

s/ Brenda B. Kirby

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SCHEDULE 1.

FOOTBALL GAMES ON GOODWYN FIELD

DATE	TIME	TEAMS
9/9	3:45 PM	Goodwyn "B" v. Bellingrath
9/10	3:45 PM	Goodwyn "C" v. Bellingrath
9/10	7:30 PM	Montgomery Academy v. Wilcox County
9/11	10:00 AM	Goodwyn "A" v. Loveless
9/11	8:00 PM	Stephens Spear v. Edgewood
9/14	6:00 PM	Lee "B" v. Dothan

DATE	TIME	TEAMS
9/16	3:45 PM	Goodwyn "B" v. Floyd
9/23	7:00 PM	Central Alabama Academy v. Chambers Co.
9/24	8:00 PM	Stephen Spear v. Sparta
9/25	10:00 AM	Goodwyn "A" v. Carver
9/25	7:30 PM	Catholic v. Long
9/29	7:00 PM	Lee "B" v. Jeff Davis
10/2	10:00 AM	Goodwyn "A" v. B.T. Washington
10/4	7:00 PM	Lee "B" v. Enterprise
10/7	7:30 PM	Stephen Spear v. Central Ala. Academy
10/8	3:45 PM	Goodwyn "C" v. Baldwin
10/8	6:00 PM	Montgomery Academy "B" v. Lakeside
10/8	7:30 PM	Montgomery Academy "A" v. Lakeside
10/14	3:45 PM	Goodwyn "B" v. Baldwin
10/15	7:30 PM	Montgomery Academy v. Pleasant Grove
10/16	7:30 PM	Central Alabama academy v. Edgewood
10/19	7:30 PM	Lee "B" v. Lanier
10/22	3:45 PM	Goodwyn "C" v. Capitol Heights
10/23	8:00 PM	Stephen Spear v. Greenville
10/26	7:00 PM	Lee "B" v. Selma

DATE	TIME	TEAM
10/28	3:45 PM	Goodwyn "B" v. Capitol Heights
10/28	7:30 PM	Central Alabama Academy v. Greenville
10/29	8:00 PM	Stephen Spear v. Shelby
10/30	7:00 PM	Goodwyn "A" v. Capitol Heights
11/4	7:30 PM	Stephen Spear v. Perry C.
11/12	7:30 PM	Central Alabama Academy v. Tallapoosa

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ANSWER OF DEFENDANTS TO PLAINTIFFS' MOTION FOR SUPPLEMENTAL RELIEF

(Number and Title Omitted) (Filed Oct 12, 1971)

COME NOW the Defendants in the above entitled cause, and in response to the Petition for Supplemental Relief heretofore filed by the Plaintiffs, respectfully represent and show unto the Court as follows:

1) The Motion for Supplemental Relief fails to state a claim against these Defendants upon which relief may be granted.

2) The Motion for Supplemental Relief fails to set forth sufficient facts upon which the relief prayed for can be granted.

3) The Motion for Supplemental Relief, in seeking to enjoin the Defendants from allowing certain groups to utilize municipal recreational facilities, is not germane to the original case which sought to obtain and did obtain equal access to all municipal facilities for all persons, regardless of race.

4) The Motion for Supplemental Relief, in seeking to have the Court compel these Defendants to deny groups and organizations equal access to public recreational facilities because of the racial composition of such groups and organizations, is inconsistent with and repugnant to the original cause of action.

5) The Defendants show that the class represented by the Plaintiffs and organized groups from such class do, in fact, have the opportunity and ability

to enjoy, in an integrated fashion if they so desire, all recreational facilities operated by the City of Montgomery for the citizens of this municipality. The Plaintiffs, therefore, have had no burden placed on them as a racial group and have not been deprived of any constitutionally protected rights.

6) These Defendants deny that they have engaged in any policy, practice or custom which discriminates between racial groups with regard to the availability of recreational facilities and Defendants deny that they have engaged in any policy, practice or custom which violates the Plaintiffs' rights under the equal protection and due process clause of the Constitution of the United States. Municipal facilities in the City of Montgomery are not exclusively leased to any particular group and such facilities are not made available exclusively to any particular group. Football, basketball and baseball facilities are made available to groups who make application therefor on a non-discriminatory basis without regard to race or color, including

such private groups as churches, athletic leagues, civic clubs, charitable organizations and educational institutions without regard to race or color. Athletic participation which is sponsored by the Parks and Recreation Board, i.e., junior high school age football teams, are given preference in facility scheduling. All municipal recreational facilities throughout the City of Montgomery are open to all on an equal basis with people of the community all having equal access thereto, without regard to race or color.

CITY OF MONTGOMERY, ET AL,
DEFENDANTS

BY: s/ Walter J. Knabe
WALTER J. KNABE

s/ Drayton M. Hamilton
DRAYTON M. HAMILTON

s/ Joseph D. Phelps
JOSEPH D. PHELPS

THE STATE OF ALABAMA,

COUNTY OF MONTGOMERY.

Before me, the undersigned authority, personally

appeared Joseph D. Phelps, who is known to me, and who being by me first duly sworn, doth depose and say that he is Assistant City Attorney for the City of Montgomery and as such has knowledge of the facts set forth in the foregoing ANSWER and that such facts are true and correct to the best of his knowledge, information and belief.

s/ Joseph D. Phelps
JOSEPH D. PHELPS

SWORN TO and subscribed before me

this 11 day of October, 1971.

s/ Brenda B. Kirby
NOTARY PUBLIC, STATE AT LARGE

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DEFENDANTS' MOTION FOR SUBSTITUTION OF PARTIES DEFENDANT

(Number and Title Omitted) (Filed Dec 1, 1971)

COME NOW the Defendants in the above entitled cause and respectfully show that the Board of Commissioners of the City of Montgomery, Alabama,

a municipal corporation, is now composed of Jim Robinson as Mayor, with Cliff Evans and J. B. Rucker as Commissioners.

The Parks and Recreation Board, by virtue of recent legislation, is now legally entitled the Recreation Board of the City of Montgomery, and is composed of the following seven members: Rufus A. Lewis, Jean B. Campbell, James Hall, Mureal R. Crump, Charles Stakely, Charles W. Ross, and James E. Vice, Jr.

The Defendants respectfully suggest to the Court that substitution of the parties Defendant would be appropriate.

s/ Joseph D. Phelps,
JOSEPH D. PHELPS, ASSISTANT CI
ATTORNEY, CITY OF MONTGOMERY,
ALABAMA

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AGREEMENT FOR SUBMISSION OF CASE

(Number and Title Omitted) (Filed Dec 1, 1971)

COME NOW the Plaintiffs and the Defendants in the above entitled case, by and through their attorneys, and do hereby agree for the case to be submitted to the Court on the pleadings filed by the parties, the answers to interrogatories heretofore filed by the defendants, and upon the Fact Stipulation as attached hereto.

GEORGIA THERESA GILMORE, ET AL

BY: s/ Morris S. Dees, Jr.
ATTORNEY FOR PLAINTIFFS

CITY OF MONTGOMERY, ET AL

BY: s/ Joseph D. Phelps
ASSISTANT CITY ATTORNEY,
ATTORNEY FOR DEFENDANTS

FACT STIPULATION

(Number and Title Omitted)

The City of Montgomery has constructed and now maintains football fields adjacent to various community centers in Montgomery. The land on which these fields are built belongs to the Montgomery

County School Board. The City of Montgomery Recreation Department, by agreement with the School Board, has constructed and maintains these fields.

These football fields are fenced, sodded, and some are lighted for night use. Bleachers are provided for each field to seat approximately 600 people. Public restrooms and concession stands are provided adjacent to most football fields.

The first use of these football fields is allocated by the City Recreation Department to the twelve public junior high schools of the Montgomery County Board of Education. The City Recreation Department, through the City of Montgomery, pays the electric bills for any night use of the fields by public schools.

Additional use of these football fields are assigned by the City Recreation Department to the Montgomery YMCA's elementary school football leagues free of charge for Saturday day games. Private

schools are allowed to use the fields for day games at no cost and are charged an amount for night games to cover the cost of electric service and other expenses. This varies from a fee of $25.00 to $60.00 per game, depending on the number of lights at the field, or five percent (5%) of the gate, whichever is greater. After paying the City the prescribed fee, the private school is allowed to keep the balance of the gate receipts. The amount of this excess depends on the size of the crowd.

St. James Academy used Bellingrath Field during 1970 for one game in the daytime at no charge. For the 1971 season, Goodwyn Field will be used by the St. James Academy, the Montgomery Academy, Stephens-Spear School and Central Alabama Academy. Each is a Montgomery based private school.

The Stephens-Spear School and Central Alabama Academy have all white student bodies. The Central Alabama Academy has applied for an IRS Non-Profit Status. This application is still pending. Stephen-

Spear School is not a non-profit organization and, therefore cannot apply for IRS Non-Profit Status. The first terms of Stephens-Spear School and Central Alabama Academy were both held in September, 1970. The brochure, Exhibit "A", of Plaintiffs' Motion for Supplemental Relief was adopted and distributed by Stephens-Spear School.

Both Stephens-Spear School and Central Alabama Academy offer varsity football and are members of the Private School Athletic Association. Neither Stephens-Spear School nor the Central Alabama Academy has a football field owned by the school suitable for playing competitive games. Member schools of the Private School Athletic Association are not allowed, without special permission by the Association, to schedule games with schools which are not members of the Private School Athletic Association.

The Montgomery Academy was formed in 1959. It has an all white student body. However, it is committ by its bylaws, as well as by public announcement, to

an open admission policy on a non-discriminatory basis. It holds a certificate of tax exemption from the Internal Revenue Service based upon non-discriminatory racial policies. The Montgomery Academy is a member of the Alabama High School Athletic Association, which association includes both public and private schools. It is a condition of membership in this Association that the member schools have a non-discriminatory racial enrollment policy and all member schools have an open admission policy. Members of the Association schedule games only with other members of the Association. The Montgomery Academy schedules games with both public and private schools which are members of the Association whose playing teams and student bodies are integrated, and the playing field, gymnasium and facilities of the Montgomery Academy are used, as well as the playing fields, gymnasiums and facilities of other members of the Association.

St. James Parish School is a private school formed in 1955 by the Minister of St. James Methodist Church and by other interested parties, as a non-sectarian educational institution. It has an all white student body but has an open enrollment policy and is open to students solely on the basis of scholastic achievement, conduct and character. St. James is fielding its first football team this year. The school goes only through the 10th grade and will go through the 11th grade in the 1972-73 school year. St. James School does not belong to an athletic association. It schedules games with teams that have an open game and mainly with "B" and "C" teams.

Municipal recreational facilities in the City of Montgomery are not exclusively leased to any particular group and such facilities are not made available exclusively to any particular group. Football, basketball, and basefall facilities are made available to groups who make application therefor on a non-discriminatory basis without regard to race or

color, including such private groups as churches, athletic leagues, civic clubs, charitable organizations and educational institutions without regard to race or color. Athletic participation which is sponsored by the Parks and Recreation Board, i.e., junior high school age football teams, are given preference in facility scheduling. All municipal recreational facilities throughout the City of Montgomery are open to all on an equal basis with people of the community all having equal access thereto, without regard to race or color.

The parties to this action have agreed to submit this cause on the above stipualtion of facts.

GEORGIA THERESA GILMORE, ET AL

BY: s/ Morris S. Dees, Jr.
ATTORNEY FOR PLAINTIFFS

CITY OF MONTGOMERY, ET AL

BY: s/ Joseph D. Phelps
ASSISTANT CITY ATTORNEY
ATTORNEYS FOR DEFENDANTS

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ORDER OF SUBSTITUTION

(Number and Title Omitted) (Filed Jan 17, 1972)

Upon consideration of the motion of the defendants filed herein on December 1, 1971, and pursuant to Rule 25(d), Federal Rules of Civil Procedure, it is ORDERED that Jim Robinson, Cliff Evans and J. B. Rucker be and they are hereby substituted as party defendants and as members of the Board of Commissioners of the City of Montgomery for W. A. Gayle, Frank W. Parks and Clyde C. Sellers.

It is further ORDERED that Rufus A. Lewis, Jean B. Campbell, James Hall, Mureal R. Crump, Charles Stakely, Charles W. Ross, and James E. Vice, Jr., be and they are hereby substituted as party defendants and as members of the Recreation Board of the City of Montgomery (formerly the Park and Recreation Board of the City of Montgomery) for Mrs. James Fitt Hill, Father M. J. Rafferty, Rev. Louis Armstrong, Florian Strassburger and Jack Hope.

It is further ORDERED that Henry M. Andrews

be and he is hereby substituted as a party defendant and as Superintendent of the Parks and Recreational Porgram for the City of Montgomery, Alabama, for T. A. Belser.

Done, this the 17th day of January, 1972.

s/ FRANK M. JOHNSON, JR.
UNITED STATES DISTRICT JUDGE

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NOTICE OF APPEAL

(Number and Title Omitted) (Filed Feb 11, 1972)

Notice is hereby given that the defendants above named, hereby appeal to the United States Court of Appeals for the Fifth Circuit from the injunction and order of the United States District Court for the Middle District of Alabama, Northern Division, entered in this action on the 18th day of January, 1972 as fully set forth in the order and injunction of said date.

DONE this 10th day of February, 1972.

s/ Joseph D. Phelps
ASSISTANT CITY ATTORNEY

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MOTION FOR STAY PENDING APPEAL

(Number and Title Omitted) (Filed Mar 15, 1972)

Come now the defendants in the above entitled ca and respectfully show unto the Court that they have appealed to the United States Court of Appeals for the Fifth Circuit from the order and injunctive decree of this court made and entered herein on January 18, 1972 Copies of the Motion of Appeal and the Bond for Costs on Appeal are attached hereto and made a part hereof as Exhibits 1 and 2 respectively.

The defendants now move this Court to stay pendi appeal the following portions of the injunctive order:

"That said City of Montgomery, Alabama, its officers, agents, servants, employees and those acting in concert with it, be and each is hereby enjoined from permitting or in any way sanctioning the use of city owned or operated recreational facilities by any private group, club or organization which is not affiliated with a private school and which has a racially discriminatory admissions policy."

"That said City of Montgomery, Alabama, its officers, agents, servants, employees, and those acting in concert with it, be and each is hereby enjoined from permitting or in any way sanctioning the use of city owned or operated recreational facilities by any private school, or private school affiliated group, if such school or group is racially segregated or if it has a racially discriminatory admissions policy."

The defendants show that a stay of the above injunctive order pending appeal will not result in harm or injury to the plaintiffs, to the class which they represent, or to any citizen or resident of the City of Montgomery, Alabama, especially since all recreational facilities of this municipality are in fact open and available to all persons and to all groups of persons on a non-discriminatory basis and without regard to race or color. These defendants show that the order of this court of January 18, 1972, involves far reaching pronouncements of legal principles heretofore inprecidented in this Circuit.

The defendants further show that an implementat
of the injunctive orders pending appeal will require
private civic, religious, charitable, social and othe
non-public organizations to decide pending review as
whether they must affirmatively adopt an open admissi
policy or forfeit the use of municipal recreational
facilities. These defendants specifically urge that
all constitutional requirements are met when recreati
facilities are in fact open to all persons without
regard to race or color and on a non-discriminatory
basis. In any event, no person will be constitutiona
harmed or denied the use of any and all municipal
recreational facilities if this stay is granted
pending appeal. The defendants therefore show that
justice will be served by the granting of the
stay herein requested and by thereby allowing all
persons and groups regardless of race to continue
to use these recreational facilities pending appella
review of the order of this court.

s/ Joseph D. Phelps
JOSEPH D. PHELPS,
ASSISTANT CITY ATTORNEY

STATE OF ALABAMA

COUNTY OF MONTGOMERY,

Before me, the undersigned authority, in and for the State of Alabama at Large, personally appeared Joseph D. Phelps, who is known to me and who being by me first duly sworn on oath dothe depose and say as follows: That the facts and averments set forth in the above and foregoing Motion for Stay Pending Appeal are true and correct to the best of his knowledge, information, and belief.

s/ Joseph D. Phelps
JOSEPH D. PHELPS

SWORN TO and subscribed before me on this 15th day of March, 1972.

s/ Laquita G. Gothard
NOTARY PUBLIC

CERTIFICATE OF SERVICE

I hereby certify that I have this day delivered a copy of the foregoing Motion for Stay Pending Appeal

by hand to Honorable Morris Dees of Montgomery, Alabama, on this 15th day of March, 1972.

s/ Joseph D. Phelps
OF COUNSEL

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O R D E R

(Number and Title Omitted) (Filed Mar 16, 1972)

Upon consideration of the defendants' motion for stay pending appeal and by agreement of the plaintiffs, it is ORDERED that that part of the decree of this Court made and entered January 18, 1972, reading as follows:

> "That said City of Montgomery, Alabama, its officers, agents, servants, employees and those acting in concert with it, be and each is hereby enjoined from permitting or in any was sanctioning the use of city owned or operated recreational facilities by any private group, club or organization which is not affiliated with a private school and which has a racially discriminatory admissions policy."

be and the same is hereby stayed pending a determination of the matter upon appeal.

The sole basis for granting defendants' motion is plaintiffs' agreement thereto, and the granting thereof should not be interpreted as a feeling on the part of this Court that the portion of said decree herein stayed is not, in all respects, correct. To the contrary, this Court feels that all portions of the decree made and entered herein are proper and, indeed, required by the facts presented in connection with this matter and the applicable and controlling law.

It is further ORDERED that all other provisions in the decree of this Court made and entered January 18, 1972, remain in force and effect.

Done, this the 16th day of March, 1972.

s/ Frank M. Johnson, Jr.
UNITED STATES DISTRICT JUDGE

- - - - -

MOTION FOR PRELIMINARY INJUNCTION

(Number and Title Omitted) (Filed Sep 8, 1971

Upon the Motion for Supplemental Relief and testimony to be offered at a hearing to be held on this Motion, Plaintiffs move the Court for a preliminary injunction as prayed for in the Motion for Supplemental Relief therein set forth and as grounds assign the following:

1. The Private School Football League has already begun its 1971-72 football season. Stephens-Spear's first home game is scheduled for Saturday night, September 11, at Goodwyn Community Center football field. Central Alabama Academy's first home football game is scheduled for Thursday night, September 23, at Goodwyn Community Center football field.

2. This is not the first time the defendants have permitted the City's revenues and facilities to be used by racially segregated private schools and groups. See Smith v. YMCA, supra. Furthermore, these segregated schools and other racially segregate

schools and groups will probably request and be allowed to use other City recreational facilities before this cause is decided on the merits by the Court. It is imperative that this unconstitutional practice is terminated before plaintiffs' rights are further violated.

3. The law is so well settled in this area of the law that defendants' conduct is patently unconstitutional. Plaintiffs' Equal Protection and Due Process rights are present and immediate rights and plaintiffs should not be required to suffer further deprivations of their rights while awaiting a ruling from the Court on the merits of the case.

4. Any prejudice or harm to the defendants resulting from the issuance of a Preliminary Injunction is far outweighed by the irreparably injury which will be suffered by plaintiffs if this motion is denied.

Respectfully submitted,

LEVIN & DEES

By s/ Howard Allyn Mandell
Howard Allyn Mandell

ATTORNEYS FOR PLAINTIFFS

STATE OF ALABAMA)
)
MONTGOMERY COUNTY)

Before me, a Notary Public in and for the State of Alabama at Large, personally appeared Howard Allyn Mandell, who, being duly sworn, deposes and says that the foregoing allegations of fac are true and correct to the best of his information, knowledge and belief.

s/ Howard Allyn Mandell
Howard Allyn Mandell

SWORN TO AND SUBSCRIBED before me

this 8th day of September, 1971.

s/ Becky Ann Logan
Notary Public

- - - - -

Supreme Court of the United States

No. 72-1517

Georgia Theresa Gilmore, et al.,

Petitioners,

v.

City of Montgomery, Alabama, et al.

ORDER ALLOWING CERTIORARI. Filed October 15 ----------, 19 73.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth ----------Circuit is granted.

Supreme Court of the United States

No. 72-1517

Georgia Theresa Gilmore, et al.,

Petitioners,

v.

City of Montgomery, Alabama, et al.

FILE
MAY 10

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-1517

GEORGIA THERESA GILMORE, GUSSIE CARLTON, SYLVIA JOHNSON, J. C. SMITH, MATTIE CARGILL, FRED HARRIS, GEORGE STEPHENS, ELIZABETH BROWN, on behalf of themselves and all others similarly situated,

Petitioners,

-v.-

CITY OF MONTGOMERY, ALABAMA, a Municipal Corporation; BOARD OF COMMISSIONERS OF THE CITY OF MONTGOMERY; JIM ROBINSON, CLIFF EVANS and J. B. HUCKER, as Members of the Board of Commissioners of the City of Montgomery; RECREATION BOARD OF THE CITY OF MONTGOMERY; RUFUS A. LEWIS, JEAN B. CAMPBELL, JAMES HALL, MUREAL R. CRUMP, CHARLES STAKELY, CHARLES W. ROSS and JAMES E. VICE, JR., as Members of the Recreation Board of the City of Montgomery; HENRY M. ANDREWS, as Superintendent of the Parks and Recreational Program for the City of Montgomery, Alabama,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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28 U.S.C. 1254(1) . . . . . .

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No.

GEORGIA THERESA GILMORE, GUSSIE CARLTON, SYLVIA JOHNSON, J. C. SMITH, MATTIE CARGILL, FRED HARRIS, GEORGE STEPHENS, ELIZABETH BROWN, on behalf of themselves and all others similarly situated,

Petitioners,

-v.-

CITY OF MONTGOMERY, ALABAMA, a Municipal Corporation; BOARD OF COMMISSIONERS OF THE CITY OF MONTGOMERY; JIM ROBINSON, CLIFF EVANS and J. B. RUCKER, as Members of the Board of Commissioners of the City of Montgomery; RECREATION BOARD OF THE CITY OF MONTGOMERY; RUFUS A. LEWIS, JEAN B. CAMPBELL, JAMES HALL, MUREAL R. CRUMP, CHARLES STAKELY, CHARLES W. ROSS and JAMES E. VICE, JR., as Members of the Recreation Board of the City of Montgomery; HENRY M. ANDREWS, as Superintendent of the Parks and Recreational Program for the City of Montgomery, Alabama,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The opinion of the United States District Court for the Middle District of Alabama, Northern

Division, is reported at 337 F.Supp. 22, and a copy of it is appended at 17a. The opinion of the United States Court of Appeals for the Fifth Circuit is reported at _____F.2d_____, No. 72-1610 (2-9-73) and a copy of it is appended at 1a.

JURISDICTION

The judgment of the Court of Appeals was entered on February 9, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

I. May a city provide free meeting and recreational facilities to private organizations, where such facilities are used by club members, while such organizations have a racially discriminatory membership policy?

II. Must a city under an affirmative duty to desegregate its schools avoid all aid to private segregationist academies, or is it required only to refuse aid which would substantially aid such schools?

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment of the Constitution of the United States.

STATEMENT OF THE CASE

a. *The Proceedings Below*

This Complaint was originally filed on December 22, 1958, seeking declaratory and injunctive relief barring the restriction of City-owned recreational facilities to members of the white race. On September 9, 1959, the District Court issued a Memorandum Opinion and Judgment which declared the municipal ordinance providing for racial segregation of recreational facilities void, and ordered that the custom of denying Negroes the use of the parks in Montgomery was unconstitutional and void.

A Motion For Supplementary Relief was filed in this class action litigation on September 8, 1971. It sought a temporary and permanent injunction against the defendants which would bar their

sanctioning the use of municipal recreational facilities by any school, group or organization which was racially segregated or had a racially discriminatory admissions policy.

On December 1, 1971, the parties filed an Agreement for Submission of the Case agreeing that the case would be submitted to the Court on the pleadings filed, the answers to interrogatories and a Fact Stipulation.

On January 18, 1972, the District Court issued an order and injunction declaring the defendant City's policy and practice of permitting the use of city-owned or operated recreational facilities by any private school or private school affiliated group, which school is racially segregated or which has a racially discriminatory admissions policy unconstitutional; enjoining the defendants from in any way sanctioning the use of city-owned or operated recreational facilities by any private school, or private school affiliated group, if such school or group is racially segregated or if it has a racially discriminatory

admissions policy; declaring the defendants' policy and practice of permitting the use of city-owned or operated recreational facilities by any private group, club or organization which has a racially discriminatory admissions policy unconstitutional; enjoining defendants from permitting or in any way sanctioning the use of city-owned or operated recreational facilities by any private group, club or organization which is not affiliated with a private school and which has a racially discriminatory admissions policy.

Defendants filed timely notice of appeal to the United States Court of Appeals for the Fifth Circuit on February 11, 1973.

The United States Fifth Circuit Court of Appeals modified in part and reversed in part on February 9, 1973. As to private segregated schools, the Court found the order of the District Court overbroad and remanded to the District Court "to make clear that the City of Montgomery is not prohibited from permitting *nonexclusive* access to

public recreational facilities and general government services by private schools or school affili groups." (Emphasis Added). The order was reversed as to the prohibition against use of public recreational facilities by private non-sch organizations which have a policy of racial segregation.

b. *The Facts*

The City of Montgomery, beginning for the first time in Fall, 1970 (Tr. 34)[1/], provided City-owned and maintained football fields to private segregated schools for use in playing competitive games.[2/] Stephens-Spear School, the

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1/ All references to the Fifth Circuit appendix are designated by "Tr."

2/ A comprehensive school desegregation orde requiring zoned attendance was handed down affecti the City of Montgomery public schools on February 1970. Up until that time, a freedom of choice pl existed that resulted in little school integratio Carr v. Montgomery County Bd. of Educ., 289 F. Su 647 (M.D. Ala., 1968), *aff'd* 395 U.S. 225 (1969); further order entered by District Court on Febru 25, 1970 unreported. *Aff'd* 429 F.2d 382 (5th Cir., 1970).

Central Alabama Academy, the Montgomery Academy and St. James School are each private segregated schools which scheduled the use of City of Montgomery Public football fields for the 1971 football season (Tr. 34 & 36).

The defendants charge no fee to private segregated schools, or any other such organization or club, but permit use of public facilities for meetings or recreational activities with only a charge for electricity at night athletic contests. The difference between the power cost and the gate receipts go to the private group or organization. (Tr. 24-26).

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED BECAUSE LONG-STANDING ISSUES OF PUBLIC POLICY ARE AT STAKE, INCLUDING DESEGREGATION OF THE PUBLIC SCHOOL SYSTEM AND DESEGREGATION OF PUBLIC FACILITIES.

This petition presents two related issues which must be read against the background a prolonged litigation to require the City of Montgomery to desegregate its recreational facilities and its schools. The first complaint in this

cause was filed in 1959; it sought the desegregati of the City's recreational facilities, and relief was granted.[3/] In 1970 supplemental relief was requested on the grounds that equal facilities were not being provided in the black and white residential sections of the city. After one day o trial the defendants agreed to a settlement in which two million dollars would be spent to upgra facilities in black neighborhoods.[4/] In the meantime it had been discovered that the City had entered into a private agreement with the segrega local YMCA to ensure that facilities closed after the first *Gilmore* order would be provided through the YMCA to Montgomery's citizens on a segregated basis. This effort to circumvent the original

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[3/] Gilmore v. City of Montgomery, 175 F.Supp 776 (M.D. Ala. 1959), *modified*, 277 F.2d 364 (5th Cir. 1960). The City responded by shutting down its parks. *See* Smith v. YMCA, 316 F.Supp. 899, 909 (M.D. Ala. 1970), *aff'd* 462 F.2d 634 (5th Cir. 1973).

[4/] The order of the District Court is unrepo The Court stated that plaintiffs "have made an extremely strong case of denial of equal protecti Brief for Appellees, below, pp. 32-33.

Gilmore order has also been enjoined.[5/]

Read against this backdrop, it is easy to understand why the *Gilmore* plaintiffs became alarmed in 1971 when there occurred a sudden upsurge in use of public facilities by segregationist private organizations. Private segregationist academies, for example, which had previously scheduled few games in public football stadiums, took up 45% of the playing dates in 1971.[6/] Believing this new turn in events to represent a significant inhibition upon attainment of the goal of nondiscrimination in provision of public services, and also believing the use of public football fields by "white-flight" academies to

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[5/] Smith v. YMCA, 316 F.Supp. 899 (M.D. Ala. 1970), *aff'd* 462 F.2d 634 (5th Cir. 1970). *See* note 3 *supra*. While the parks had been reopened after 1960, many recreational programs normally conducted by the City (baseball, swimming) were resumed only under the segregated YMCA subterfuge.

[6/] App. 4a, n. 4. Of 31 games scheduled 14 involved all-white private schools.

frustrate the achievement of a unitary school system, the petitioners used the existing *Gilmore* case to ask for judicial relief.

II. CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE COURT OF APPEALS FOR THE FIFTH CIRCUIT MISCONCEIVED THE PRINCIPLES OF LAW SET FORTH IN *MOOSE LODGE NO. 107 v. IRVIS*, 407 U.S. 163 (1972), AS APPLIED TO THE USE OF PUBLIC FACILITIES BY PRIVATE SEGREGATED ORGANIZATIONS.

As we have stated two issues are presented in this petition. They derive from the two alternative theories which petitioners argued to support their request for relief. First, and applicable to both school and non-school segregated organizati the petitioners argued that the City's action was in support of private racial discrimination and barred under the equal protection clause. Second, the petitioners argued that with respect to the use of public facilities by private segregationist schools, the city's provision of services should be enjoined on the narrower ground that it frustrated school desegregation.

Regarding the first argument and coverage of gationist non-school organizations, the Court of A

reversed the District Court's injunction[7] by citing *Moose Lodge No. 107 v. Irvis*.[8] The Plaintiffs contend that the City's grant of its own public lands and facilities for the use of discriminatory private organizations is substantially different from a private club's discrimination on its own premises. The *Moose Lodge* Court's treatment of *Burton v. Wilmington Parking Authority*[9] supports this view, for the Court quoted extensively from *Burton* to show that in the parking authority situation the

> "land and building were publicly owned. As an entity the building was dedicated to 'public uses' in performance of the Authority's 'essential governmental functions.' The costs of land acquisition, construction, and maintenance are

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[7] App. 13a

[8] 407 U.S. 163 (1972)

[9] 365 U.S. 715 (1961).

> defrayed entirely from donations by the City of Wilmington, from loans and revenue and parking services out of which the loans and bonds were payable."10/

The Court went on to contrast that situation with the one before it in *Moose Lodge:*

> Here there is nothing approaching the symbiotic relationship between lessor and lessee that was present in *Burton* . . . Unlike *Burton,* the Moose Lodge building is located on land owned by it, *not by any public authority.*11/

It must be clear to even the most casual observer that the public football stadiums and recreational areas involved in the case *sub judice* fall within the *Burton* holding.12/ Indeed, the

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10/ *Id. quoting* Burton v. Wilmington Parking Authority, at 723-24.

11/ 407 U.S. at ____, 32 L.Ed 2d at 638, (Emphasis Added).

12/ In a sence the facts of this case are even more compelling than those in *Burton,* for there (o

Court of Appeals admitted that the instant situation was "closer to the facts of *Burton*."[13] It attempted to rule out *Burton*, however, on the grounds that the "periodic use" of public facilities by segregated groups does not come within "symbiotic relationship" required by *Irvis*.[14] But surely this misconceives *Irvis*: "one-shot" state discrimination is just as unconstitutional as a continuing relationship.[15] Indeed, where the discrimination occurs on the city's own property, one wonders whether the symbiosis concept has any place at all.[16] In short, the Court of Appeal's reliance on *Irvis* is misplaced.

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the city authority had no foreknowledge that the restaurant-lessee was going to discriminate, while the City of Montgomery very well knew that these private academies either had discriminatory admission policies or were in fact all-white.

[13] App. 15a

[14] *Id.*

[15] *See eg,* Jones v. Alfred Mayer, 392 U.S. 409; *cf.* Monroe v. Pape, 365 U.S. 167.

[16] *See* pp. 17-18, *infra*.

III. CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE COURT OF APPEALS FOR THE FIFTH CIRCUIT ERRED IN PERMITTING SOME USE OF PUBLIC FACILITIES BY PRIVATE SEGREGATED SCHOOLS.

With respect to the petitioners' second argument, the Court of Appeals ruled that the City's provision of recreational facilities to private segregationist academies did indeed frustrate court-ordered desegregation efforts.[17] Yet the test employed by the court led it to narrow significantly the scope of the district court's order. It is with this test, and its implications for relief, that the petitioners quarrel.

The Court of Appeals agreed with the petitioners' contention that because they impede desegregation efforts, white private academies should be treated as splinter school districts to which the commands of *Wright v. Council of City of Emporia*[18] would apply. The *Wright* decision rejected the Fourth

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[17] App. 9a-10a

[18] 407 U.S. 451 (1972).

Circuit's primary or substantial effect test and instead re-declared its own test: *any* action which tends to inhibit desegregation cannot be tolerated.[19/]

The Fifth Circuit's "exclusive use" test does nothing more than restate the Fourth Circuit's discredited "substantial effect" test. It allows the City to continue to provide some benefits to segregationist academies, just so long as the benefits are not provided on an exclusive basis. That contravenes this Court's repeated instructions that "[s]tate support of segregated schools through *any arrangement,* management, *funds or property* cannot be squared with" the equal protection clause.[20/]

IV. OTHERS REASONS FOR GRANTING THE WRIT.

There are reasons for granting review other than the fact that the holding below is erroneous.

[19/] *Id* at 407 U.S. at ____, 33 L.Ed 2d 61.

[20/] Cooper v. Aaron, 358 U.S. 1, 19 (1958) (emphasis supplied).

A.

The issues presented here are new and serious ones. This Court has had to deal with repeated efforts to frustrate school and government segregation in the South, and the tactics challenged in this suit are another very significant phase in that chain of litigation. The Court below referred to this case as involving a "recurrent problem of the use of public property by segregated private schools."[21/] All of the cases to which the Court of Appeals then referred have been decided since 1971. The breakthrough case to prevent city co-operation with private clubs in providing segregated recreational facilities has also been decided only recently.[22/]

B.

Guidance for the lower courts is desparately needed on the issues here presented. In dealing with its cases regarding public property for

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[21/] App. 3a

[22/] Smith v. YMCA, 462 F.2d 634 (5th Cir. 1972) *aff'g* 316 F.Supp. 899 (M.D. Ala. 1970).

private school uses, the Fifth Circuit has floundered in an unusual sea of indecision. The court's opinion in *McNeal v. Tate County School District*, 460 F.2d 574-5 (5th Cir. 1972), was issued after a previous decision in the case had been handed down but withdrawn. Similarly, the Fifth Circuit has had trouble deciding the manner of relief to the accorded. In *United States v. State of Mississippi*, No. 72-2521 (April 11, 1973), the Court sanctioned relief which would have integrated the private school which received state property. In the case *sub judice*, the city was ordered to stop aiding such schools.

C.

The lower courts are split on what effect to give to *Moose Lodge* and how to distinguish between *Moose Lodge* and *Burton*. *Compare* the opinion of the Court of Appeals here *with Falkenstein v. Dept. of Revenue for the State of Oregon*, 350 F.Supp 887 (1972) (three judges), Appeal Dismissed 93 S. Ct. 907 (1-8-73), *Hale v. Crossroads Associates*, 469 F.2d 616 (2nd Cir. 1972) and *Lucas v. Wisconsin Electric Power Company*, 466 F.2d 638 (7th Cir. 1972), *cert den.* 93 S.Ct. 928

(1-8-73). Since the instant case and the many oth which the Fifth Circuit has faced involved city use of city-controlled land and facilities, the issues presented here are not likely to be illuminated by t Supreme Court's consideration of other state actio cases. *See Lucas v. Wisconsin Electric Power*, 466 F.2d 638 (7th Cir. 1972), *cert den.* 93 S.Ct. 928 (1-8-73); *cf Falkenstein v. Dept. of Revenue for th State of Oregon*, 350 F.Supp 887 (1972)(three judges) Appeal Dismissed 93 S.Ct. 907 (1-8-73).

D.

The "exclusive use" rationale formulated by th court below is simply unworkable. The term is nowh defined in the court's opinion. Confusion over the test is further increased because the stipulation of facts explicitly states that no exclusive use was in in the use of public football fields,[23/] and yet th Court of Appeals ruled that activity to be forbidde under its test.

Surely some accommodation of rights must be m Private school students who individually use public

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[23/] Tr. 36

libraries to do their homework should not be penalized, but what about the segregated school group which takes advantage or recreational facilities on a non-exclusive basis? The Court of Appeals' facile illustration that "[n]o schools, public or private, were shown to have constructed. . . zoos, parks, and the like,"[24] totally misses the point; for in fact neither do Montgomery public schools construct football stadiums — a common city-owned recreational facility is used. Yet the court below held private use of football stadiums to be covered by its test and decree.

E.

There may be important first amendment rights at stake in the present case. The Court of Appeals recognized, as do the petitioners, that the "freedom to choose one's associates in private clubs. . . is an important constitutional right."[25] But we cannot agree that it follows that government must provide facilities for private groups which discriminate.[26]

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[24] App. 11a.

[25] App. 15a

[26] *See Id.*

And surely the issue requires more discussion than a citation using the signal "cf." and referring to two cases which have no bearing on racial discrimination.[27] The petitoners are certain that the issue deserves considered attention, but two sentences and a "cf." citation do not resolve the matter.

CONCLUSION

For the above reasons, petitioners respectfully request that the writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

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[27] *See* App. at 15a-16a. The court's confusion of equal protection and first amendment due process analyses is further demonstrated by its reliance upon a freedom of religion case to support its contention that a state under a duty to desegregate need not be the "adversary" of segregationist academies. App. 10a, *citing* Everson v. Board of Education, 330 U.S. 1, 18 (1947).

Respectfully submitted

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Attorneys for Plaintiffs gratefully acknowledge the assistance provided in the preparation of this petition by Charles F. Abernathy, third year student, Harvard Law School.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-1610

GEORGIA THERESA GILMORE, ET AL,
Plaintiffs-Appellees,

versus

CITY OF MONTGOMERY, ET AL,
Defendants-Appellants.

Appeal from the United States District Court for the Middle District of Alabama

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(February 9, 1973)

Before MORGAN, CLARK and INGRAHAM, Circuit Judges.

CLARK, Circuit Judge: The City of Montgomery makes football, basketball, and baseball facilities owned and operated by it available to private groups, including schools, churches, civic clubs and charitable organizations.[1] Plaintiffs, black residents of Montgom-

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[1]The city schedules private events on a prior reservation basis, subject to a preference given to public schools and to the Park and Recreation Board. Private organizations are granted the exclusive possession of municipal facilities during scheduled

ery, utilized this long standing class action proceeding[1] to seek an injunction against the City's practice of permitting the use of these public recreational facilities by racially segregated private schools and clubs. The district court granted an injunction, *inter alia*, prohibiting the use of city-owned recreational facilities by any private school which is racially segregated or by any private group, club, or organization, other than a private school, which has a racially discriminatory admissions policy. The full text of the order portion of this injunction is set out in the margin.[3] We hold

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contests and are allowed to set, collect, and retain admission fees. There is no charge for use of municipal baseball and basketball facilities or for the daytime use of football stadiums. A fee of 25 dollars to 60 dollars, depending on the amount of electrical lighting involved, or 5% of the gate, whichever is greater, is charged for night use of the football stadiums.

[2]The decision below is reported at 337 F.Supp. 22 (M.D. Ala. 1972). One previous opinion is reported at 176 F.Supp. 778 (M.D. Ala. 1959), *aff'd as modified*, 277 F.2d 364 (5th Cir. 1960). An interim unreported order requiring equalization of recreational facilities in black neighborhoods was entered January 21, 1971. In related litigation, the maintenance of segregated recreational programs through the subterfuge of a "private association" has been enjoined. Smith v. Y.M.C.A. of Montgomery, 316 F.Supp. 899 (M.D. Ala. 1970), *aff'd* 462 F.2d 634 (5th Cir. 1972).

[3] 1. That the City of Montgomery, Alabama's policy and practice of permitting the use of city owned or operated recreational facilities by any private school, or private school affiliated group, which school or group is racially segregated or which has a racially discriminatory admissions policy be and the same is hereby declared unconstitutional.

2. That said City of Montgomery, Alabama, its officers, agents, servants, employees, and those acting in concert with it, be and each is hereby enjoined from permitting or in any way sanctioning the use of city owned or operated recreational facilities by any private school, or private school affiliated group, if such school or group is racially segregated or if it has

this order of the district court overbroad and affirm only to the extent that the City be enjoined from permitting the use of public recreational facilities for official athletic contests and similar functions involving racially segregated private schools and school affiliated groups.

I.

SEGREGATED PRIVATE SCHOOLS

A. The Facts

This case involves the recurrent problem of the use of public property by segregated private schools in school districts under court order to desegregate public schools. *Cf. Graves v. Walton County Bd. of Education*, 465 F.2d 887 (5th Cir. 1972); *McNeal v. Tate County School District*, 460 F.2d 568 (5th Cir. 1972); *Wright v. City of Brighton*, 441 F.2d 447 (5th Cir. 1971)..

In 1964 the district court held that Montgomery schools were being operated on a segregated basis in

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a racially discriminatory admissions policy.

3. That said City of Montgomery, Alabama's policy and practice of permitting the use of city owned or operated recreational facilities by any private group, club or organization which has a racially discriminatory admissions policy be and the same is hereby declared unconstitutional.

4. That said City of Montgomery, Alabama, its officers, agents, servants, employees and those acting in concert with it, be and each is hereby enjoined from permitting or in any way sanctioning the use of city owned or operated recreational facilities by any private group, club or organization which is not affiliated with a private school and which has a racially discriminatory admissions policy.

violation of the Fourteenth Amendment and ordered the desegregation of four grades in the fall of that year. *Carr v. Montgomery County Bd. of Education*, 232 F.Supp. 705 (M.D. Ala. 1964). *See also* 253 F.Supp. 306 (M.D. Ala. 1966) and 289 F.Supp. 647 (M.D. Ala. 1968), *aff'd* 395 U.S. 225, 89 S.Ct. 1670, 23 L.Ed.2d 263 (1969). In August, 1969, the district court found that the freedom-of-choice plan which had been in effect since 1967 had not been effective in disestablishing the dual school system and, accordingly, the court directed the United States, through the Department of Health, Education and Welfare, to formulate a comprehensive desegregation plan for Montgomery County. This plan which would have eliminated virtually all one-race schools in the city was approved by the district court in February, 1970, and affirmed with minor modifications by this court, 429 F.2d 382 (5th Cir. 1970).

Prior to implementation of this comprehensive desegregation plan in Montgomery, there had been limited use of public stadiums and similar facilities by private schools. However, in fall, 1971, at least four private schools with all-white enrollments, each of which had expanded its enrollment and extracurricular program subsequent to the extensive desegregation of Montgomery public schools, scheduled their home football games in public stadiums.[4] One of these schools has announced that it will not enroll black students

[4]The relative proportion of public and private school usage of public athletic facilities is indicated by the schedule of football games at Goodwyn Field in Autumn, 1971: of 31 total games scheduled, 14 involved all-white private schools, 16 were contests between public school teams, and in one game the home team was a desegregated Roman Catholic School.

The others have "declared" open enrollment policies but, in point of fact, none of these private schools have Negro students enrolled.

The district court found that by allowing private schools to schedule their athletic contests in public facilities, "Montgomery is providing aid to private, segregated schools, thus encouraging and facilitating their establishment and operation as an alternative for white students who in most instances are seeking to avoid desegregated public schools. ... [T]he creation and operation of these private, segregated schools is to the detriment of a racially balanced public school system in Montgomery, Alabama." 337 F.Supp. at 24-25. Specifically, the court found that the use of public athletic facilities aids such private schools in at least three direct ways: (1) the opportunity to play athletic contests in public facilities "contributes considerably to the attractiveness" of the all-white private schools and draws white students from public schools, thus increasing the difficulty of desegregating public education; (2) the use of public facilities saves the capital outlay required to build similar facilities; and (3) the City's action in granting the schools exclusive possession of city property for the duration of the contest provides a means by which the schools can raise extra revenue through the sale of tickets and refreshments.

B. The Law Applicable to the Injunction in General

Subsequent to the implementation of a comprehensive school desegregation plan in Montgomery, new

segregated private schools were established, enrollment in existing all-white private schools increased, and simultaneously, these schools began to make frequent use of public recreational facilities for their official school functions. Because of the court's prior mandate to Montgomery to eliminate racial discrimination in education, and in light of the capacity of all-white private schools to frustrate this goal, any state involvement with such schools is subject to special scrutiny. *McNeal v. Tate County School Bd.*, *supra*, 460 F.2d at 574-75.[5] It is well established that federal courts may enjoin any state assistance to private school organizations which serves to "impede, thwart or frustrate the execution of the integration plan mandated against [a public school district]." *Aaron v. Cooper*, 169 F.Supp. 325, 336 (E.D. Ark. 1959), applying on remand the principles laid out by the Supreme Court, 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 1 (1958) and the Eighth Circuit, 261 F.2d 97 (1958).[6] Also see Grif-

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[5] *Cf.* Bright v. Isenbarger, 314 F.Supp. 1382, 1392-94 (N.D. Ind. 1970), *aff'd* 445 F.2d 412 (7th Cir. 1971); Powe v. Miles, 407 F.2d 73, 81 (2d Cir. 1968).

[6] In *Cooper*, the Supreme Court, referring to the actions of public officials in Little Rock, Arkansas, who were assisting the creation of a segregated private school system, declared:

> . . . the constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this Court in the Brown case can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted "ingeniously or ingenuously." Smith v. Texas, 311 U.S. 128, 132, 85 L.Ed. 84, 87, 61 S.Ct. 164.
>
> . . . State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the [Fourteenth] Amendment's com-

fin v. County School Bd., 377 U.S. 218, 84 S.Ct. 1226, 12 L.Ed.2d 256 (1964).

The adverse effects of the creation of all-white private schools on public school desegregation have long been recognized in this circuit. *United States v. Jefferson County Bd. of Education*, 372 F.2d 836, 849 (1966), *aff'd en banc* 380 F.2d 385, *cert. denied*, 389 U.S. 840, 88 S.Ct. 67, 19 L.Ed.2d 103 (1967). More precisely, we have recognized that the departure of white students and teachers into private educational institutions disrupts planned desegregation of the public school system and causes resegregation,[7] that such "white flight" has the potential to reduce community support and resources available for public education,[8] and that resulting racial isolation perpetuates the stigma long associated with racially segregated education.[9]

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mand that no State shall deny to any person within its jurisdiction the equal protection of the laws.

358 U.S. at 17-19, 78 S.Ct. at 1409-10.

[7] *E.g.*, Boyd v. Pointe Coupee Parish School Bd., 332 F.Supp. 995 (E.D. La. 1971). See also, *e.g.*, United States v. Scotland Neck City Bd. of Education, 407 U.S. 484, ——, 92 S.Ct. 2214, 2218, 33 L.Ed.2d 75 (1972); Monroe v. Bd. of Comm. of City of Jackson, 391 U.S. 450, 459, 88 S.Ct .1700, 1705, 20 L.Ed.2d 727 (1968); United States v. Hinds County School Board, 433 F.2d 598, 601 (5th Cir. 1970).

[8] *E.g.*, United States v. Hinds County School Bd., 433 F.2d 605, 609 (5th Cir. 1970).

[9] *E.g.*, Wright v. City of Brigton, *supra*, 441 F.2d at 451; Poindexter v. La. Financial Assistance Comm., 258 F.Supp. 158, 163 (E.D. La. 1966) and 275 F.Supp. 833, 851 (E.D. La. 1967), *aff'd* 389 U.S. 571, 88 S.Ct. 693, 19 L.Ed.2d 780 (1968).

Indeed, the effect of the enrollment of white children in private segregated schools is not unlike the creation of "splinter" school districts which contain proportionately more white children than the existing district. The creation of such splinter districts has been held unconstitutional where "the secession has a substantial adverse effect on desegregation of the [remaining] school district." *Lee v. Macon County Bd. of Education*, 448 F.2d 746, 752 (5th Cir. 1971). While public authorities are not required to achieve racial balance within each school within their jurisdiction, where *de jure* segregation has existed they are required to "make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." *Davis v. Bd. of School Comm. of Mobile County*, 402 U.S. 33, 37, 91 S.Ct. 1289, 1292, 28 L.Ed.2d 577 (1971). Carving out a new, substantially whiter splinter school district is inconsistent with this affirmative duty. *Wright v. Council of City of Emporia*, 407 U.S. 451, 92 S.Ct. 2166, 33 L.Ed.2d 51 (1972); United States v. Scotland Neck City Bd. of Education, 407 U.S. 484, 92 S.Ct. 2214, 33 L.Ed.2d 75 (1972).

Thus, neither through splinter public school districts nor through private school systems may officials whose community is subject to a desegregation order assist the establishment or maintenance of segregated educational systems which accomplish indirectly what the court has forbidden such officers to accomplish directly. *Cooper v. Aaron, supra; Lee v. Macon County Bd. of Education*, 267 F.Supp. 458, 475-76 (M.D. Ala.), *aff'd sub nom. Wallace v. United States*, 389 U.S. 215, 88 S.Ct. 415, 19 L.Ed.2d 422 (1967).

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The district court found that by allocating exclusive possession of public recreational facilities such as football stadiums, baseball diamonds, basketball courts, and tennis courts for official athletic contests and similar functions sponsored by racially segregated private schools, the City provides a publicly supported means by which these schools may generate revenue for the support of their activities. Of more practical significance, the court found that by using existing public facilities, these schools can avoid the substantial capital investment required to build comparable facilities, as well as current expenditures for maintenance and repair.

Notwithstanding the importance of these financial benefits, we would emphasize that "this is not merely a controversy over a sum of money." *Simkins v. Moses H. Cone Memorial Hospital*, 323 F.2d 959, 967 (4th Cir. 1963), *cert. denied*, 376 U.S. 938, 84 S.Ct. 793, 11 L.Ed.2d 659 (1964). In the case at bar, the district court recognized that the opportunity to use public stadiums and similar facilities for official school functions enhanced the attractiveness of segregated private schools. Students and their parents will be more attracted by a private school which, with public assistance, can offer a complete extracurricular program comparable in all aspects with that offered in public schools. Without reaching the broader issue of whether the operation of the segregated private schools themselves involves state action, we hold that the findings and conclusions of the court are supported by the record and are sufficient to sustain that portion of the injunction which forbids scheduling athletic contests and similar func-

tions which involve segregated private schools in municipal facilities.

C. The Distinction Between Exclusive and Nonexclusive User

The district court found that granting exclusive possession of public recreational facilities to segregated private schools for the purpose of official school functions will significantly affect desegregation of the public school system. Therefore, the court was well within the ambit of its equitable discretion in enjoining city officials from permitting such usage.

However, to the extent that the court's order may be read to prohibit the use and enjoyment of public recreational facilities by individual children or groups of students enrolled at private schools in common with other members of the public, we find the order to be overbroad. The children enrolled in private schools have an unquestioned right as citizens to make use of all municipal recreational facilities. The Supreme Court has pointed out that, while the Constitution requires public authorities to abstain from assisting certain private schools, "it does not require the state to be their adversary." *Everson v. Bd. of Education*, 330 U.S. 1, 18, 67 S.Ct. 504, 513, 91 L.Ed. 711 (1947).

Permitting private school groups to enjoy such recreational facilities as zoos, museums, and parks or to attend, along with other citizens, civic and cultural events conducted in city recreational facilities does not involve the same degree of affirmative state action

as granting exclusive control of public facilities for private school functions. Nonexclusive use of governmental facilities and services does not provide a means by which schools may raise revenue. No schools, public or private, were shown to have constructed or maintained facilities such as zoos, parks and the like. Thus, the opportunity to make communal use of this type of recreational facility does not enable the private school to duplicate public school operations at public expense. The nonexclusive enjoyment of municipal recreational facilities by private school children was not proven to present a sufficient threat to desegregated public education to support an injunction restraining the clear personal right of the affected children to enjoy such usage in common with the rest of the public.

D. Distinction Among Segregated Schools on the Basis of Declared Enrollment Policy

On appeal we are asked to make a distinction between the use of public facilities by private schools which have an announced policy of accepting only white students and by those schools which, though never having enrolled a black child, have declared an "open admissions" policy. This distinction would be inconsistent with the rationale for our limited affirmance of the injunction. The basis for the district court's action lies in its authority to prevent impediments by public authorities which hinder the accomplishment of the constitutional duty, specifically recognized in earlier orders of that court, to desegregate the Montgomery public school system. It was well within the

ambit of the district court's discretion to find that the right of black children to enjoy a desegregated public education could be frustrated as effectively when whites leave the public system for private schools which are segregated adventitiously as when their "flight" is to private schools which are segregated as a matter of school policy.[10] Therefore, we affirm the decision of the district court not to distinguish among segregated schools on the basis of their admissions policies.[11]

II.

NON-SCHOOL ORGANIZATIONS

The district court also enjoined the City of Montgomery fom permitting the use of municipal recreational facilities by all private organizations, including churches, civic clubs, social, fraternal, and charitable societies, which have a "racially discriminatory ad-

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[10] *Cf.* King, *Rebuilding the "Fallen House" — State Tuition Grants for Elementary and Secondary Education*, 84 Harv. L. Rev. 1057, 1081 (1971).

[11] We need not reach the question of what degree of actual desegregation of a private school student body might deprive a court of its discretion to find that the effect of public involvement with such a private school is inconsistent with the due performance by public officials of their prior court ordered duty to achieve a unitary public school system. That issue is not presented in this case. Nor do we attempt to predict whether, as substantial accomplishment of the mandate to establish a unitary school system occurs, the adverse effect of private school use of public facilities may diminish or disappear, thus making the present injunction no longer appropriate. Cf. Wright v. City of Emporia, *supra*, 407 U.S. at ——, 92 S.Ct. at 2207 [headnotes 15, 16].

missions policy."[12] This part of the injunction involves very different considerations from the preceeding sections dealing with segregated private schools and school affiliated groups. While the injunction against private school usage is based upon the affirmative obligation of public authorities to eliminate educational segregation, the injunction against similar usage by non-school organizations must rest, if at all, upon a general constitutional prohibition against state-sponsored racial discrimination.

Subsequent to the decision below, the Supreme Court delivered its opinion in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972), involving the constitutionality of granting a state liquor license to a fraternal organization with a racially discriminatory membership policy. In *Irvis*, the Supreme Court reversed an injunction forbidding licensing the Moose Lodge until it ceased its discriminatory practices. In so doing, the Court pointed out:

> The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatever. Since state-furnished services include such necessities of life as electricity, wa-

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[12]The district court made no findings about the history, frequency, or effects of public recreational facilities by such non-school affiliated private organizations. Furthermore, in this case which was tried on stipulated facts nothing was stipulated which would support this prong of the injunction.

> ter, and police and fire protection, such a holding would utterly emasculate the distinction between private as distinguished from State conduct set forth in The Civil Rights Cases [109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835 (1883)] and adhered to in subsequent decisions. Our holdings indicate that where the impetus for the discrimination is private, the State must have "significantly involved itself with invidious discriminations," Reitman v. Mulkey, 387 U.S. 369, 380, 87 S.Ct. 1627, 1634, 18 L.Ed.2d 830 (1967), in order for the discriminatory action to fall within the ambit of the constitutional prohibition.

407 U.S. at 173, 92 S.Ct. at 1971. Distinguishing its earlier decisions involving state-supported discriminatory refusal of service in private restaurants, *Peterson v. City of Greenville*, 373 U.S. 244, 83 S.Ct. 1119, 10 L.Ed.2d 323 (1963) and *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961), the court held that the state licensing of the Harrisburg Moose Lodge did not significantly affect the right of minority groups to purchase liquor or to obtain club licenses for themselves. 407 U.S. at ____, 92 S.Ct. at 1973.

Irvis requires reversal of that portion of the district court's order which deals with non-school affiliated groups. *Irvis* involved the licensing of an otherwise private club located in a private building, while the present case involves the use of publicly owned recreational facilities. The use of public property brings this

ase closer to the facts of *Burton*. There are, however, wo controlling distinctions. First, the periodic use of ecreational facilities by private clubs does not approach the "symbiotic relationship" between the public parking authority and the private lessee that was resent in *Burton*. Second, *Burton* involved a restaurant holding itself out as a place of public accomodation. The injunction in the present case, like the injunction in *Irvis*, affects bona fide private social and eligious organizations. The freedom to choose one's ssociates in private clubs, churches, and civic organations is an important constitutional right and a basic principle of our pluralistic society. *See, e.g., Evans v. Newton*, 382 U.S. 296, 298-299, 86 S.Ct. 486, 488, 15 L.Ed.2d 373 (1966); *NAACP v. Button*, 371 U.S. 415, 444-45, 83 S.Ct. 328, 344, 9 L.Ed.2d 405 (1963); Emerson, *Freedom of Association and Freedom of Expression*, 74 Yale L. J. 1 (1964). Where there is no significant effect on the countervailing rights of excluded individuals,[13] such private groups cannot be denied access public recreational facilities solely because of their discriminatory admissions policies.[14] *Cf. Sherbert v. Ver-*

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[13] *Compare* Wesley v. City of Savannah, 294 F.Supp. 698 (S.D. Ga. 1969). *Cf.* Falkenstein v. Dept. of Revenue for the State of Oregon, ——— F. Supp. ———, 41 U.S.L.W. 2282 (D. Ore. 1972); McGlotten v. Connally, 338 F.Supp. 448 (D. D.C. 1972); Pitts v. Dept. of Revenue for the State of Wisconsin, 333 F.Supp. 662 (E.D. Wisc. 1971).

[14] This case does not involve any evasion of the city's responsibility to operate recreational facilities on a desegregated basis by the subterfuge of converting such facilities to private control. *See, e.g.*, Hampton v. City of Jacksonville, 304 Fed. 320 (5th Cir.), *cert. denied*, 371 U.S. 911, 83 S.Ct. 256, 9 L.Ed.2d 170 (1962); *Cf.* Palmer v. Thompson, 403 U.S. 217, 222-23, 91 S.Ct. 1940, 1944, 29 L.Ed.2d 438 (1971).

ner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963); *Speiser v. Randall*, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958).

III.

CONCLUSION

On remand, the district court is directed to limit its injunctive order by deleting paragraphs 3 and 4 relating to private non-school groups, clubs and organizations and by amending paragraphs 1 and 2 to make clear that the City of Montgomery is not prohibited from permitting nonexclusive access to public recreational facilities and general government services by private schools or school affiliated groups.

REMANDED, with direction

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

ORDER

This case now is submitted upon plaintiffs "Motion for Supplemental Relief" wherein they contend that they are deprived of constitutional rights under the Fourteenth Amendment to the United States Constitution by the City of Montgomery's policy and practice of permitting racially segregated private schools and other segregated groups to use city recreational facilities.[1/] Plaintiffs ask that the Court declare the city's policy and practice unconstitutional and enjoin the city from allowing or in any way sanctioning the use of its recreational facilities by any private school or other private group which is racially segregated or which has a racially discriminatory admissions policy.

[1/] The original case concerned the desegregation of all public recreational facilities operated by the City of Montgomery. This Court's opinion and injunction are reported in *Gilmore v. City of Montgomery*, 176 F.Supp. 776 (M.D. Ala. 1959), affirmed as modified in *City of Montgomery, Alabama v. Gilmore*, 277 F.2d 364 (5th Cir. 1960)

In opposition to this motion, defendants deny that the city's practice of making city owned or operated facilities open and available to all people, regardless of race, violates plaintiffs' constitutionally protected rights. The facts relevant to plaintiffs' motion are stipulated and the motion is now submitted upon the pleadings, stipulation and briefs.

The City of Montgomery makes its football, basketball and baseball facilities available on a nondiscriminatory basis to private groups who apply for them. Such private groups include schools, churches, civic clubs and charitable organizations. Among the private schools taking advantage of the city's generosity are St. James School, the Stephens-Spear School, Central Alabama Academy and the Montgomery Academy. Of these schools only Stephens-Spear has a published discriminatory admissions policy. The Montgomery Academy and St. James School have "declared" open enrollment policies.[2/]

[2/] This Court emphasizes the word "declared"

As to these and all other segregated private schools, the city's aid is unconstitutional. The Court is unable to distinguish the present case from those cases which struck down state statutues providing tuition grants to students attending private schools. If a tuition grant case arose in a state previously subject to *de jure* segregation, two elements, in addition to state aid, always were present. Initially, the state's school boards were under an affirmative constitutional duty to desegregate, and, secondly, the effect of the state tuition grant scheme was to frustrate the right of Negroes to attend a desegregated public school by permitting white students to escape to segregated private schools. E.g., *Coffey v. State Educ'l Finance Comm'n,* 296 F.Supp. 1389 (S.D. Miss. 1969) (three judges); *Poindexter v.*

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because these schools have no Negroes in attendance. As a matter of fact, none of the private schools that are using these public facilities have Negro students or teachers.

Louisiana Financial Assis. Comm'n, 275 F.Supp. 833 (E.D. La. 1967) (three judges), *aff'd,* 389 U.S. 571 (1968). Each of these elements is present in the case *sub judice*. Clearly, Montgomery is providing aid to private, segregated schools, thus encouraging and facilitating their establishment and operation as an alternative for white students who in most instances are seeking to avoid desegregated public schools. In addition, Montgomery school board and all other city governmental officials are under an affirmative constitutional duty to desegregate. See *McNeal v. Tate Co. School District,* 5th Cir. No. 30722, September 17, 1971.

This Court considers irrelevant the amount of city aid provided to the private schools. The applicable standard was enunciated in a tuition grant case, *Griffin v. State Bd. of Educ.,* 296 F.Supp. 1178 (E.D. Va. 1969) (three judges), where the court said: "[A]*ny* assist *whatever* by the state towards provision of a racially segregated education exceeds the pale of tolerance

demarked by the Constitution. . . . In our judgment, . . . [t]he *effect* of the State's contribution is a sufficient determinant. . ." Thus, this Court concludes from *Griffin* that what is important is the *effect* the state's aid has on the maintenance of a racially balanced public school system, but that the *extent* of the aid provided is immaterial.

Even if one assumes, however, that the degree of aid is relevant, the aid provided in the present case is substantial and it significantly affects the Montgomery public school system. The opportunity to participate in sports contributes considerably to the attractiveness of any school and thereby enhances enrollments while, in the instances now presented, drawing students away from the public school system. In addition, the city saves private schools money by furnishing them a place to play free of charge. The cost of buying land and maintaining a football field, or of building a gymnasium, requires a substantial financial outlay. The money saved, or course, is being used to operate these private, segregated

institutions. Even more significant, the city's aid in this case provides a means by which the school can raise extra revenue through the sale of tickets and refreshments. Needless to say, the creation and operation of these private, segregated schools is to the detriment of a racially balanced public school system in Montgom Alabama.

The City attempts to justify its action on the ground that it makes its facilities available to all groups regardless of race, and thereby, maintains a racially neutral policy with respect to private discrimination. Such conduct by the city, however, is not legally sufficient. In *Griffin, supra*, even though no invidious purpose or intent on the part of the state was demonstrabl and even though the tuition program provided grants for which both blacks and whites in private schools were equally eligible, the court voided the state statute because, in effect, the tuition scheme tended to frustrate the opportunity of

Negroes to attain public education in a desegregated institution. The court said: "In our judgment, it follows that neither motive nor purpose is an indispensable element of the breach." *McNeal v. Tate Co. School Dist., supra,* also is pertinent to the issue involved here. In that case, the Fifth Circuit set aside the sale of a public school building to an all-white private school, although the school board that sold the property acted in good faith and did not know that the private school discriminated against Negroes. The Court said: "[S]chool boards are charged with the *affirmative* duty to take whatever steps might be necessary to bring about a unitary educational system which is free from racial discrimination. . . . That duty includes making some sort of reasonable investigation of prospective purchasers. . . ." In the instant case, the Montgomery City officials are charged with an affirmative duty to bring about and maintain a desegregated public school system.

Providing aid to segregated private schools is incompatible with that constitutional obligation. Thus, it becomes apparent that Montgomery's policy of making its facilities available to all schools without regard to racial composition, does not constitute a defense to the present action.

Neither does a private, segregated school's "declared" nondiscriminatory, open admissions polic constitute a defense to the city's aiding that school. The test is whether the city's aid frustrates the right of black citizens to a desegregated public education. When the effect upon that right is the same, no difference in constitutional result should exist. Therefore, regardless of the school's "declared" admissions policy, the mere fact of its segregation renders any state aid to it unconstitutional.

As to that aspect of plaintiffs' motion relating to private clubs and organizations other than those affiliated with private schools, this Court feels the test should be somewhat different. Whereas state and city officials are under an affirmative obligation to end discrimination i

situations involving education, this affirmative duty does not extend to cases involving private groups other than those affiliated with schools. Consequently, although state aid to such a group is unconstitutional if the organization discriminated on the basis of race, the mere fact that such an organization is segregated is not enough to render state aid to it *per se* constitutionally improper.

Accordingly, it is the ORDER, JUDGMENT and DECREE of this Court:

1. That the City of Montgomery, Alabama's policy and practice of permitting the use of city owned or operated recreational facilities by any private school, or private school affiliated group, which school or group is racially segregated or which has a racially discriminatory admissions policy be and the same is hereby declared unconstitutional.

2. That said City of Montgomery, Alabama, its officers, agents, servants, employees, and those acting in concert with it, be and each

is hereby enjoined from permitting or in any way sanctioning the use of city owned or operated recreational facilities by any private school, or private school affiliated group, if such school or group is racially segregated or if it has a racially discriminatory admissions policy.

3. That said City of Montgomery, Alabama's policy and practice of permitting the use of city owned or operated recreational facilities by any private group, club or organization which has a racially discriminatory admissions policy be and the same is hereby declared unconstitutional.

4. That said City of Montgomery, Alabama, its officers, agents, servants, employees and those acting in concert with it, be and each is hereby enjoined from permitting or in any way sanctioning the use of city owned or operated recreational facilities by any private group, club or organization which is not affiliated with a private school and which has a racially discriminatory admissions policy.

5. That the costs of this proceeding be and the same are hereby taxed against the defendants.

Done, this the 18th day of January, 1972.

s/ Frank M. Johnson, Jr.
UNITED STATES DISTRICT JUDGE

. . . . . .

WRIT OF INJUNCTION

To the above-named defendants:

TAKE NOTICE that you and each of you, your officers, agents, servants, employees, and those acting in concert with you, be and you are hereby ENJOINED as more particularly set out in the order of this Court made and filed herein on this date, a copy of which is herewith served upon each of you by certified mail.

WITNESS my hand and the seal of this Court at Montgomery, Alabama, on this the 18th day of January, 1972.

Jane P. Gordon
Clerk of the United States District Court
for the Middle District of Alabama

(SEAL)

By: s/ Marie Thurman
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDL

DISTRICT OF ALABAMA, NORTHERN DIVISION

GEORGIA THERESA GILMORE ET AL.,	)	
Plaintiffs,	)	CIVIL ACTION
v.	)	NO. 1490-N
CITY OF MONTGOMERY, ALABAMA, ET AL.,	)	
Defendants.	)	

ORDER

Upon consideration of the opinion of the United States Court of Appeals for the Fifth Circu rendered in this cause February 9, 1973, and the mandate of that Court received by the Clerk of this Court on March 6, 1973, it is the ORDER, JUDGMENT and DECREE of this Court that the injunctive order of this Court made and entered January 18, 1972, be and the same is hereby amended as follows:

By deleting paragraphs 3 and 4 relating to private, non-school groups and organizati

It is further ORDERED that paragraphs 1 and 2 of the said injunctive order be and each is hereby amended by adding:

> The injunction issued by this Court does not prohibit the City of Montgomery from permitting non-exclusive access to public recreational facilities and general government services by private schools or school affiliated groups.

Done, this the 19th day of March, 1973.

s/ Frank M. Johnson, Jr.
UNITED STATES DISTRICT JUDGE

(SEAL)

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No.

GEORGIA THERESA GILMORE, GUSSIE CARLTON, SYLVIA JOHNSON, J. C. SMITH, MATTIE CARGILL, FRED HARRIS, GEORGE STEPHENS, ELIZABETH BROWN, on behalf of themselves and all others similarly situated,

PETITIONERS,

v.

CITY OF MONTGOMERY, ALABAMA, a Municipal Corporation; BOARD OF COMMISSIONERS OF THE CITY OF MONTGOMERY; JIM ROBINSON, CLIFF EVANS and J. B. RUCKER, as Members of the Board of Commissioners of the City of Montgomery; RECREATION BOARD OF THE CITY OF MONTGOMERY; RUFUS A. LEWIS, JEAN B. CAMPBELL, JAMES HALL, MUREAL R. CRUMP, CHARLES STAKELY, CHARLES W. ROSS, and JAMES E. VICE, JR., as Members of the Recreation Board of the City of Montgomery; HENRY M. ANDREWS, as Superintendent of the Parks and Recreational Program for the City of Montgomery, Alabama,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. WAS THE COURT OF APPEALS CORRECT IN HOLDING THAT THE CONSTITUTION

DOES NOT PREVENT THE INDIVIDUAL AND NON-EXCLUSIVE USE AND ENJOYMENT OF PUBLIC RECREATIONAL FACILITIES BY INDIVIDUAL CHILDREN OR GROUPS OF CHILDREN, IN COMMON WITH OTHER MEMBERS OF THE PUBLIC, BECAUSE SUCH CHILDREN ATTEND A "ONE RACE" SCHOOL?

II. WAS THE COURT OF APPEALS CORRECT IN HOLDING THAT PRIVATE ORGANIZATIONS, INCLUDING CHURCHES, CIVIC CLUBS, FRATERNAL AND CHARITABLE ORGANIZATIONS, OTHER THAN SCHOOLS, ARE ENTITLED TO USE AND ENJOY PUBLIC RECREATIONAL FACILITIES WITHOUT REGARD TO THE RACIAL ADMISSION POLICIES OF SUCH PRIVATE ORGANIZATIONS?

STATEMENT OF THE CASE

The original complaint in this class action litigation, which commenced more than a decade ago, sought equal access for Negroes to the public parks in Montgomery, Alabama. In the original decision, the District Court (modified and affirmed by the Court of Appeals for the Fifth Circuit) held that while the City was not required to open and operate parks, if municipal parks were operated each must be available for the benefit of all the public regardless of race or color upon a non-discriminatory basis, *Gilmore, et al. v. City of Montgomery, et al.*, 176 F. Supp. 776, 780; 277 F. 2d 364. The City thereafter opened all parks and recreational facilities on a non-discriminatory basis.[1]

1. In a 1970 proceeding the City agreed to upgrade and equalize all municipal recreational facilities and now has in fact substantially complied with its agreement.

In a 1971 motion for supplemental relief, the petitioners asked the District Court to:

"Issue a permanent injunction against defendants, their officers, agents, servants, and employees, restraining them from allowing or in any way sanctioning the use of city owned and operated recreational facilities by any private school, group, club or organization which is racially segregated or which has a racially discriminatory admissions policy."

The City by answer in the District Court took the position that the 1971 supplemental motion was not germane to the original case which sought to obtain and which did obtain equal access to all municipal facilities for all persons, regardless of race. These respondents also asserted in the District Court that the 1971 Motion for Supplemental Relief, in seeking to have the Court compel the municipality to deny groups and organizations equal access to public recreational facilities because of the racial composition of such groups and organizations, was inconsistent with and repugnant to the original class action.

The supplemental motion was submitted to the District Court upon an agreed statement of facts which included the express stipulation that:

"Municipal recreational facilities in the City of Montgomery are not exclusively leased to any particular group and such facilities are not made available exclusively to any particular group. Football, basketball and baseball facilities are made available to groups who make application therefor on a non-discriminatory basis without regard to race or color, including such private groups as churches, athletic leagues, civic clubs, charitable organizations, and educational institutions,

without regard to race or color. Athletic participation which is sponsored by the [Municipal] Parks and Recreation Board, i. e., junior high school age football teams, are given preference in facility scheduling. All municipal recreational facilities throughout the City of Montgomery are open to all on an equal basis with people of the community all having equal access thereto, without regard to race or color."

The District Court in its Order of January 18, 1971, found unconstitutional and enjoined the practice of the City in permitting the use of city owned or operated recreational facilities by any private school or private school affiliated group, which school or group is racially segregated or which has a racially discriminatory admissions policy. The District Court also found unconstitutional and enjoined the practice of the City in permitting the use of city owned or operated recreational facilities by any private group, club or organization which has a racially discriminatory admission policy.

Pending appeal to the United States Court of Appeals for the Fifth Circuit, the District Court granted a stay as to the part of the Order pertaining to private groups, clubs and organizations other than private schools.

The Court of Appeals affirmed the District Court Order with regard to segregated private schools.[2] The Court of Appeals reversed, as "overbroad," the portion of the District Court Order which dealt with private groups, clubs and organizations, other than schools.

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2. The Court of Appeals made the clarification that children who are enrolled in private schools could not be denied the non-exclusive use of municipal recreational facilities, i.e., zoos, museums, parks, in common with the rest of the public.

REASONS FOR DISALLOWANCE OF WRIT

I

THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT THE CONSTITUTION DOES NOT PREVENT THE INDIVIDUAL AND NON-EXCLUSIVE USE AND ENJOYMENT OF PUBLIC RECREATIONAL FACILITIES BY INDIVIDUAL CHILDREN OR GROUPS OF CHILDREN, IN COMMON WITH OTHER MEMBERS OF THE PUBLIC, BECAUSE SUCH CHILDREN ATTEND A "ONE RACE" SCHOOL.

The decision of the Court of Appeals dealing with schools affords the petitioners no judicial basis of legitimate complaint. The petitioners sought and obtained in the Courts below all of the constitutional relief they requested in this regard. The Court of Appeals even held that private schools with open admissions policies are to be prevented from using municipal facilities if the schools are in point of fact all white. The Court of Appeals expressly held that private schools and school affiliated groups which have either a discriminatory admissions policy or which are all white are not to be permitted to use municipal recreational facilities. The petitioners now ask the Supreme Court of the United States to grant certiorari on the issue as to whether children who attend a "one race" private school are to be prohibited from their individual, non-exclusive use of such facilities as zoos, museums, parks and cultural events in common with other members of the public. The Court of Appeals found:

"The nonexclusive enjoyment of municipal recreational facilities by private school children was not proven to present a sufficient threat to desegre-

gated public education to support an injunction restraining the clear personal right of the affected children to enjoy such usage in common with the rest of the public."

It would indeed be harsh and constitutionally unwarranted to deny individual children the right to use, in common with other members of the public, a municipal museum or zoo solely on the basis of the racial composition of the school the child may attend. As stated of the Court of Appeals:

". . . while the Constitution requires public authorities to abstain from assisting certain private schools, 'it does not require the state to be their adversary,' *Everson v. Bd. of Education,* 330 U. S. 1, 18; 67 S. Ct. 504, 513; 91 L.Ed 711 (1947)."

II

THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT PRIVATE ORGANIZATIONS, INCLUDING CHURCHES, CIVIC CLUBS, FRATERNAL AND CHARITABLE ORGANIZATIONS, OTHER THAN SCHOOLS, ARE ENTITLED TO USE AND ENJOY PUBLIC RECREATIONAL FACILITIES WITHOUT REGARD TO THE RACIAL ADMISSION POLICIES OF SUCH PRIVATE ORGANIZATIONS.

Both the District Court and the Court of Appeals found that different standards must be applied to schools and school affiliated groups than those applied to private organizations, other than schools.[3] The Court of Appeals in the case of "non-school" private

3. See District Court Order of January 18, 1972, and decision of the Court of Appeals of February 9, 1973.

groups, using public recreational facilities, found from the record "no significant effect on the countervailing rights of excluded individuals." The record, in fact, established, as previously noted, that all recreational facilities in the City of Montgomery are in fact open to all persons without regard to race. The petitioners do not even contend that they, or any members of their class, are excluded from any municipal facilities. The Court of Appeals concluded therefore that "such private groups cannot be denied access to public recreational facilities solely because of their discriminatory admissions policies."

We respectfully submit that the constitutional right of private clubs to choose members as they see fit has been consistently recognized, *Moose Lodge No. 107 v. Irvis*, 407 U. S. 163; 92 S. Ct. 1965; 32 L. Ed 2d. 627 (1972). The freedom to choose one's associates in private clubs, churches, and civic organizations, was recognized by the Court of Appeals below as an important constitutional right and a basic principle of our pluralistic society. The Court cited *Evans v. Newton*, 382 U. S. 296, 298, 299; 86 S. Ct. 486, 488; 15 L.Ed 2d. 373 (1966); *NAACP v. Button*, 371 U. S. 415, 444, 445; 83 S. Ct. 328, 344; 9 L. Ed 2d. 405 (1963); *Emerson, Freedom of Association and Freedom of Expression*, 74 Yale L. J. 1 (1964). In the case sub judice, the exercise of the rights of association has not harmed the petitioners or any of the members of their class. No invidious discrimination was shown or claimed in the courts below. No constitutionally permissible purpose could therefore be served by denying the use of public recreational facilities to private groups who exercise their rights of association.

CONCLUSION

The Respondents respectfully submit that the Petition for Certiorari should be denied.

Respectfully submitted,

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June, 1973

In The

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1517

GEORGIA THERESA GILMORE, GUSSIE CARLTON, SILVIA JOHNSON, J.C. SMITH, MATTIE CARGILL, FRED BARBER, GEORGE STEPHENS, ELIZABETH BROWN, on behalf of themselves and all others similarly situated,

Petitioners,

v.

CITY OF MONTGOMERY, ALABAMA, a Municipal Corporation; BOARD OF COMMISSIONERS OF THE CITY OF MONTGOMERY; JIM ROBINSON, CLIFF EVANS and J.E. BUCKER, as Members of the Board of Commissioners of the City of Montgomery; RECREATION BOARD OF THE CITY OF MONTGOMERY; RUFUS A. LEWIS, JEAN A. CAMPBELL, JAMES HALL, MURRAL E. CRUMP, CHARLES STARKEY, CHARLES W. ROSS and JAMES E. VICE, JR., as Members of the Recreation Board of the City of Montgomery; HENRY M. ANDREWS, as Superintendent of the Parks and Recreational Program for the City of Montgomery, Alabama,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONERS

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United States v. State of Mississippi, 476 F.2d 941 (1973) 24

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Restatement of Contracts, Section 90 79

Terjen, *Close-up on Segregation Academies,* New South, Vol. 27, No. 4, p. 50 24

Webster's New Twentieth Century Dictionary, Unabridged, Second Edition, p. 1847 . . . 79

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 72-1517

GEORGIA THERESA GILMORE, GUSSIE CARLTON, SYLVIA JOHNSON, J. C. SMITH, MATTIE CARGILL, FRED HARRIS, GEORGE STEPHENS, ELIZABETH BROWN, on behalf of themselves and all others similarly situated,

Petitioners,

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINION BELOW

The opinion of the Circuit Court is reported

at 473 F.2d 832 (5th Cir. 1973).

JURISDICTION

This is an action to enjoin a municipality from authorizing the use of public recreational facilities by private segregated academies and groups. It originated through a motion for supplemental relief filed in the United States District Court for the Middle District of Alabama, Northern Division, on September 8, 1971 (App. 15). On January 18, 1972, the District Court enjoined the defendants from permitting private segregated groups to use public recreational facilities. 337 F.Supp. 722 (App. 17a-27a). On February 11, 1972, the defendants filed notice of appeal to the United States Court of Appeals for the Fifth Circuit (App. 69).

The Court of Appeals affirmed the decision of the District Court only insofar as it enjoined the exclusive use of public recreational facilities by private segregated academies, reversed the decision insofar as it enjoined non-exclusive use of such facilities by segregated school groups, and reversed

as to the use of such facilities by other private segregated groups (App. 1a-16a). The opinion of the Court of Appeals is reported at 473 F.2d 832.

The judgment of the Court of Appeals was entered February 9, 1973 (App. 1a). The District Court entered an order dated March 18, 1973, complying with the directions of the Court of Appeals (App. 28a-29a).

The petition for writ of certiorari was filed May 10, 1973, and was granted October 15, 1973. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

I. Whether a governmental body may be enjoined from permitting organized, program-oriented use of public recreational facilities by private segregated academies or must such use be exclusive before the authorization amounts to a violation of the fourteenth amendment to the United States Constitution?

II. Whether a governmental body may be enjoined from permitting the organized use of public recreational facilities by private clubs or groups which have a policy of racial segregation?

STATEMENT OF THE CASE

This suit is now fifteen years old. Shortly before Christmas in 1958 the plaintiffs filed their original complaint against the City of Montgomery to halt segregation in public recreational facilities (App. 2). The District Court (Johnson, J.) thereafter enjoined the defendants from refusing to allow blacks to use public recreational facilities. *Gilmore v. City of Montgomery*, 176 F.Supp. 776 (M.D. Ala. 1959), *modified to direct retention of jurisdiction, affirmed as modified*, 227 F.2d 364 (5th Cir. 1960). The city responded by closing its parks to whites and blacks alike, declaring, "The commission will not operate integrated parks."[1/]

1/ *See*, Smith v. YMCA of Montgomery, 316 F.Supp. 899, 909 (M.D. Ala. 1970), *aff'd*, 462 F.2d 634 (5th Cir. 1972).

Despite the court's injunction, the city, by an ingenious subterfuge, continued to maintain its segregationist policy. By a covert arrangement between the city and the local segregated YMCA, the city effectively carried out its municipal goal of providing recreational programs to its citizens, and by hiding these programs under the private YMCA name, the city for a dozen years evaded the constitutional mandate of Judge Johnson's 1959 *Gilmore* injunction.[2/] The almost total transfer of city recreational activities to the private club umbrella is revealed in the YMCA's growth from a one-building, 1,000-member organization in 1957 to an 18,000-member conglomerate with six branches and eight swimming pools in 1969.[3/] In 1970 Judge Johnson responded to a separate suit brought by black

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[2/] *See, Id.*, 462 F.2d at 638.

[3/] *See, Id.* at 639.

children, *Smith v. YMCA*,[4] to halt this systematic violation of his 1959 *Gilmore* order.

Even as the city turned over most of its recreational duties to the YMCA, it took steps to see that the remaining unclosed facilities under its control would remain segregated. In the early and middle 1960's every factor seemed to indicate that *Brown v. Board of Ecuation* would be a paper tiger; most schools, in the urban south at least, remained almost totally segregated. The city hit upon the plan of focusing its remaining recreational programs around the segregated neighborhood schools. And to insure that whites got the benefits, the city simply built recreation centers and facilities at white schools in white neighborhoods — black schools in black neighborhoods got nothing.[5] When black

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[4] 316 F.Supp. 899 (M.D. Ala. 1970), *aff'd*, 462 F.2d 634 (5th Cir. 1972).

[5] *See*, Gilmore v. City of Montgomery, Plaintiffs' Motion to Cite Defendants for Contempt and for Other Relief, Unreported Order of January 21, 1972 (*see* fn. 2 in Appendix at 2a).

citizens again went to court to halt further evasion of the original *Gilmore* order, the city, after Judge Johnson found the plaintiffs' evidence persuasive, agreed to a multi-million dollar building program in black neighborhoods.[6] Meanwhile, Montgomery was just beginning to come under an effective school desegregation decree,[7] and the consequent integration of schools also helped to eliminate the "separate but equal" aspects inherent in the city's neighborhood-school-oriented recreational program.

From the time of the original *Gilmore* decree until the early 1970's black citizens had carried on a running legal battle with their segregationist-minded white governing body. The city commission had structured a web of entangling agreements to

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[6] *Id.* In an unreported order the District Court stated, before settlement but after hearing, that Plaintiffs "have made an extremely strong case of denial of equal protection." (Addendum, p. 85).

[7] Carr v. Montgomery County Board of Education, 429 F.2d 392 (5th Cir. 1970).

perpetuate segregation, not hesitating to turn to private groups or to use the school system as its tool. The facts of related cases began to meld together as it became clear that school desegregation orders affected park desegregation and evasions of one court order led to prohibitory injunctions in a related case. Considering this background of circumventions, it was not surprising that in the events of 1970-71 the black community sensed another evasion.

As we noted above, in the autumn of 1970 Montgomery schools for the first time came under a sweeping and effective school desegregation decree. Although some private segregated schools had been in existence for several years, (App. 63-66) the city in autumn, 1970, for the first time began to authorize the academies' use of public recreational facilities to carry on their school-oriented activities. What began as a trickle of use in the football season for 1970 turned to a flood in the 1971 season (App. 53). That was when the original *Gilmore* plaintiffs moved to file the instant suit, seeking further

relief in their case to prevent the city from fostering segregated recreational activities by making its facilities available to private segregated schools and clubs.[8/]

There is no question that the private academies involved here are segregationist schools fed by white students fleeing school integration.[9/] One of the schools publicly advertised its policy of racial discrimination (App. 28), while the others claimed open enrollment but have in fact admitted no blacks (App. 64-65).

The District Court found the city's policy and practice of permitting private segregated schools and groups to use public recreational facilities to be unconstitutional (App. 19a) regardless of the amount

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[8/] Organizations and clubs having an affirmative policy of racial discrimination are also authorized to use public recreational facilities (App. 18, 45 and 57-8).

[9/] This was the finding of both the district and appellate courts, and it has not been challenged here by cross-appeal.

or degree of city aid provided (App. 20a). The only distinction made between private segregated schools and clubs or organizations was in the test to be applied in determining "segregation." In the case of schools, segregation was found by examining the racial composition of the student body and faculty (App. 24a), while in the case of non-school clubs or organizations the fact of segregation was established *only* if an affirmative policy of racial discrimination in admissions were shown (App. 25a).

The Fifth Circuit Court of Appeals reversed the District Court, holding that the city could constitutionally permit private segregated school use of public recreational facilities so long as such use was not exclusive (App. 10a-11a), and holding that the city could not be enjoined from permitting non-school private segregated organizations to use public recreational facilities (App. 12a-16a). The Circuit panel affirmed the District Court only insofar as its rulings on exclusive use of public facilities

by private segregated academies (App. 9a-10a) and the test to be applied in determing whether a school is segregated (App. 11a-12a).

Petitioners took exception to the panel's rulings with respect to the exclusive use doctrine and private non-school organizations, and it was to these findings that the petition for writ of certiorari was directed.

SUMMARY OF ARGUMENT

The equal protection clause of the fourteenth amendment does not permit public officials to authorize the use of public recreational facilities to private segregated schools. *Norwood v. Harrison*, ____U.S.____, 37 L.Ed. 2d 723 (1973); *Cooper v. Aaron*, 358 U.S. 1 (1958); *Watson v. City of Memphis*, 373 U.S. 536 (1963). The fact that the discrimination is initiated by the private school and not by the city in no way absolves the officials from their responsibility to adhere to equal protection demands. *Shelley v. Kraemer*,

334 U.S. 1 (1948).

In considering fundamental equal protection, the feelings of inferiority generated by public support or encouragement of segregated schools is the evil sought to be eliminated through vigorous enforcement of the fourteenth amendment, *Brown v. Board of Education*, 377 U.S. 483 (1954); *Poindexter v. Louisiana Financial Assistance Commission*, 275 F.Supp. 833 (E.D. La. 1967)(three judges), *aff'd* 389 U.S. 571 (1968); *Dawson v. Mayor and City Council of Baltimore City*, 220 F.2d 386 (4th Cir. 1955) *aff'd* 350 U.S. 877 (1955).

Where there has been a prior finding of racial segregation in the public school system, an affirmative duty to eliminate all vestiges of racial discrimination in the system fastens itself to public officials. *Green v. County School Board*, 391 U.S. 430 (1968); *Brown v. Board of Education*, 349 U.S. 294 (1955). City activity which has a tendency to boost in any way the attractiveness of private segregated schools

will result in further departures of whites from the public system, thus increasing segregation. *Wright v. City of Emporia*, 407 U.S. 451 (1972). In the case *sub judice* there can be little doubt as to the advantage to private segregated schools of having access to public recreational facilities, and petitioners suggest that a *res ipsa loquitur*-type rule be adopted in order to determine the existence of city support — if the school desires the use of the facility it is axiomatic that the use would enhance and support the school's program. One would look to the genecis of the activity to test whether the use sought to be prevented related to individual initiative or school program goals.

Any doctrine which permits just a little or occasional support is contrary to principles heretofore established by this Court. *Wright v. City of Emporia*, 407 U.S. 451 (1972); *Snowden v. Hughes*, 321 U.S. 1, 15 (1944)(Frankfurter, J., concurring); *Poinderter v. Louisiana Financial Assistance Commission*,

275 F.Supp. 833, 854 (E.D. La. 1967), *aff'd* 380 U.S. 571. Thus, a doctrine disallowing only that use which is exclusive fails to give the fourteenth amendment the liberal scope it demands, and is, in effect, no more than a restatement of the discredited substantial support doctrine.

Petitioners advance, *arguendo,* two possible exceptions to governmental provisions of services to private segregated schools. First, the city cannot withhold necessary services, such as fire and police protection, *Moose Lodge No. 107 v. Irvis,* 407 U.S. 163 (1972) and, second, it cannot withhold such services as are necessary for the very existence of the school, *Pierce v. Society of Sisters,* 368 U.S. 510 (1925).

City authorized use of public recreational facilities cannot meet the requirements of these exceptions. Certainly a recreational facility falls far short of being a necessity of life and the refusal to permit access is unlikely to act as

a bar to the existence of the private segregated academy. Moreover, recreational facilities are available through other sources. All that is required is land and equipment.

The concept of state action is interwoven into any discussion of governmental involvement in private segregated schools, and its existence or nonexistence can only be determined by sifting and weighing facts and circumstances. *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). *Burton* involved private segregated activity on public property as does the case *sub judice*. The city has attempted to distinguish the obvious significance of *Burton* vis a vis *Gilmore*, by asserting that *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), has narrowed the field of facts which will merge together to constitute state action. *Moose Lodge* dealt with state licensing to do a private act on private property, and is relevent to this case only in defining with specificity what state action is not.

Petitioners are making no attempt to open white flight academies to blacks, but merely are asking that the city be required to refrain from enhancing the programs of segregated schools.

The argument heretofore advanced with respect to the fourteenth amendment prohibition against state support of private segregated schools is equally applicable to private segregated nonschool organizations. Justice White agreed with the majority in *Palmer v. Thompson,* 403 U.S. 217, 252 (1971)(White, dissenting), affirming that a city or a state may not "become involved *any way* in the operation of facilities on a segregated basis." (emphasis supplied). Involvement in any way must include, by definition, authorization to use city recreational facilities. Members of a private segregated club who, as a part of their organized program, remove themselves from their segregated private facility to a public recreational facility do not leave their segregation behind.

The only constitutional argument made on behalf of schools which does not apply with equal weight to non-school organizations is that which deals with the heavy affirmative duty placed on public officials functioning in districts under court ordered school desegregation.

The City of Montgomery is already under several comprehensive orders mandating adherence to equal protection requirements in public recreation (see fn. 13, *infra*). These injunctions may not be ignored under claims of good purpose as the city would suggest, *Norwood v. Harrison*, ___U.S.___, 37 L.Ed. 2d 723, 732 (1972), nor may the city shield its conduct under the veil of neutrality.

> Although the State neither commanded or expressly authorized or encouraged the discrimination, [it] had 'elected to place its power, property and prestige behind the discrimination' and by 'its inaction . . . has . . .

> made itself a party to the [discrimination].

Reitman v. Mulkey, 387 U.S. 369, 380 (1967). Such has been the conduct of the City of Montgomery, an activity which should not be permitted to continue.

A common thread which should run throughout consideration of this case is the intimate knowledge by the District Court of the activities of the city in attempting to maintain a segregated recreational system. The District Judge who initially ruled in the case *sub judice*, has presided in each prior case related to the city's denial of equal protection in recreation to its black citizens, and his knowledge of such activities and their effect in promoting racial segregation should lend great weight to the remedies he considered necessary to effectively cause a cessation of fourteenth amendment violations. *Reitman v. Mulkey,* 387 U.S. 369, 378-9 (1967). The District Court considered it imperative that both private segregated schools and non-school

organizations be totally barred from the use of public recreational facilities.

For the reasons stated the decision of the Circuit Court should be REVERSED.

ARGUMENT

I. Introduction

The City of Montgomery has a long history of racial segregation in many areas of civic life.[10/] Its past is not so different from every southern community in which *de jure* segregation existed for

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[10/] Gayle v. Browder, 142 F.Supp. 707 (M.D. Ala.), *aff'd per curiam* 352 U.S. 903 (1956); Gilmore v. City of Montgomery, 176 F.Supp. 776 (M.D. Ala. 1959), *modified* 277 F.2d 364 (5th Cir. 1960); United States v. U. S. Klans, 194 F.Supp. 897 (M.D. Ala. 1961); Lewis v. Greyhound, Corp., 199 F.Supp. 210 (M.D. Ala. 1961); United States v. City of Montgomery, 201 F.Supp. 590 (M.D. Ala. 1962); Cobb v. Montgomery Library Board, 207 F.Supp. 880 (M.D. Ala. 1962); Carr v. Montgomery County Board of Education, 289 F.Supp. 647 (M.D. Ala. 1968), *aff'd* 395 U.S. 225 (1969), further order entered by District Court on February 25, 1970, unreported, *aff'd* 429 F.2d 382 (M.D. Ala. 1970), *aff'd* 462 F.2d 634 (5th Cir. 1972); Sims v. Montgomery County Commission, unreported, Civil Action No. 3708-N (M.D. Ala. 1972); United States v. City of Montgomery, New Developments, EPD, ¶510 (M.D. Ala. 1972); Penn v. Eubanks, ____F.Supp.____, C.A. No. 3589-N (M.D. Ala. 1973).

so many decades.[11] Much of the litigation referred to in footnote 10, *supra*, was handled by the same District Judge[12] who has handled each claim of racial discrimination related to public recreation in the City of Montgomery.[13] No single judicial officer was and is more familiar with the machinations of the City of Montgomery and its attempts to perpetuate racial segregation in public recreation.

11/ *De jure* segregation in the South is well documented, as is racial discrimination in recreation. *See, e.g.*, Dawson v. Baltimore City, 220 F.2d 386, *aff'd* 350 U.S. 877 (1955)(beaches); Holmes v. City of Atlanta, 350 U.S. 879 (1955)(golf courses); New Orleans City Park Improvement Association v. Detiege, 252 F.2d 122, *aff'd* 358 U.S. 54 (1958)(parks); St. Petersburg v. Alsup, 238 F.2d 830 (5th Cir. 1956)(beach and swimming pools); Tate v. Department of Conservation and Development, 133 F.Supp. 53, *aff'd* 231 F.2d 615, *cert. den.* 352 U.S. 838 (1956) (parks); Moorehead v. Ft. Lauderdale, 152 F.Supp. 131, *aff'd* 248 F.2d 544 (5th Cir. 1957)(golf courses); Watson v. City of Memphis, 373 U.S. 536 (1963)(parks).

12/ Frank M. Johnson, Jr., C.J., U. S. District Court for the Middle District of Alabama.

13/ Smith v. YMCA of Montgomery, 316 F.Supp. 899 (M.D. Ala. 1970), *aff'd* 462 F.2d 634 (5th Cir. 1972), finding that the city had conspired with the private YMCA to effect a totally segregated recreational (cont'

Petitioners feel that it is most important to recognize as background to this case the intimate knowledge of city governmental activities held by the District Court, especially its awareness of the City's actions and racial attitudes with respect to public recreation.[14/]

Following the lead of *McNeal v. Tate County School District*,[15/] and *Wright v. City of Brighton, Alabama*,[16/] the District Court fashioned an effective

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program. Gilmore v. City of Montgomery (unreported) C.A. No. 1490-N (M.D. Ala. 1-29-71)(App. 2a, fn. 2) adopting a plan by which the city agreed to substantial construction of recreational facilities in predominantly black areas of Montgomery; Court recognized in pre-agreement hearing that plaintiffs "have made an extremely strong case of denial of equal protection." (Addendum, p. 85).

[14/] *Cf.* Reitman v. Mulkey, 387 U.S. 369, 378-9 (1967).

[15/] 460 F.2d 568 (1972), *mod.* at 574, *cert. den.* 37 L.Ed. 2d 1044 (6-73).

[16/] 441 F.2d 447 (1971).

remedy which it felt would insure a denial of public assistance to white segregated academies. The Court then proceeded to protect against use of public recreational facilities by private segregated non-school groups. Once again, the remedy effected was one developed from a vast amount of experience in dealing with city assistance to such segregated groups, as is especially demonstrated in *Smith v. YMCA*,[17] where the City had been actively involved in providing recreation facilities to a private, segregated YMCA.

The exceptional familiarity of the District Court with the web of interrelated segregationist practices of the defendants is unusually significant in reviewing this case, for the import of the timing of the defendants' actions and the interplay of the relief given here with that ordered in related cases can best be weighed by the District Court long familiar

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[17] 316 F.Supp. 899, *aff'd* 462 F.2d 634 (5th Cir., 1971).

with local evasionary devices.

II. Private Segregated Schools and Private Segregated School Groups Cannot Constitutionally Be Permitted the Organized, Program-Oriented Use of Public Recreational Facilities

> State support of segregated schools through any arrangement, management, funds or property cannot be squared with the [fourteenth] amendment's command that no state shall deny to any person within its jurisdiction equal protection of the laws.

Cooper v. Aaron, 358 U.S. 1, 19 (1958).

Although *Cooper* was decided fifteen years ago its unanimous mandate remains clear — no state support of segregated schools can be justified.

From *Brown*[18] and its progeny[19] each of which

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[18] Brown v. Board of Education, 347 U.S. 483 (1954).

[19] Cooper v. Aaron, 358 U.S. 1 (1958); Goss v. Board of Education, 373 U.S. 683 (1963); Griffin v. County School Board of Prince Edwards County, 337 U.S.

(cont'd)

in turn strengthened the prohibition against support of segregated schools, we have envolved into an area of legal wrangling which threatens the very concept and philosophy of the evil of state-supported school segregation. The white flight academies which have sprung up throughout the South[20] have predictably been the recipients of secretive and not so secretive support from state and local governments.[21]

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218 (1964); Bradley v. School Board of Richmond, 382 U.S. 103 (1965); Green v. County School Board, 391 U.S. 430 (1968); Raney v. Board of Education, 391 U.S. 443 (1968); U. S. v. Montgomery County Board of Education, 395 U.S. 225 (1969); Alexander v. Holmes County Board of Education, 396 U.S. 19 (1969); Swann v. Charlotte-Mecklenburg, 402 U.S. 1 (1971); Keyes v. School District No. 1, ____U.S.___, 37 L.Ed. 2d 548 (1973).

[20] Tergen, *Close-up on Segregation Academies,* New South, Vol. 27, No. 4, p. 50.

[21] Norwood v. Harrison, ____U.S.____, 37 L.Ed. 2d 723 (1973); United States v. State of Mississippi, 476 F.2d 941 (1973); McNeal v. Tate County School District, 460 F.2d 568 (1972), *cert. den.* ___U.S.__, 37 L.Ed. 2d 1044 (June, 1973); Wright v. City of Brig Alabama, 441 F.2d 447 (1971); Poindexter v. Louisian (cont'

This Court decided last term that state support of private segregated education through a free textbook program was impermissible state involvement with private discrimination. *Norwood v. Harrison*, ___U.S.___, 37 L.Ed. 2d 723 (1973). We believe that the same principles apply in the instant case. In *Norwood*, Mississippi supported segregated education by providing textbooks; in *Gilmore* a state subdivision is supporting private discrimination in recreation and in education by providing the land and facilities on which the private discriminatory recreation takes place.

Certainly land and facilities are as critical to carrying on recreational activities as textbooks are to carrying out educational programs. And, just as in *Norwood*, 37 L.Ed. 2d at 731, the benefit conferred by the state, land and buildings, is easily "available from *private* sources entirely

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Financial Assistance Commission, 275 F.Supp. 833 (E.D. La. 1967)(three judges), *aff'd* 389 U.S. 571 (1968).

independent of the state" — conventional real estate salesmen and building contractors.[22/]

Even the justifications offered to sustain the state activities in our case parallel those in *Norwood*. Like Mississippi's high education-for-all purpose, Montgomery claims that its purpose is simply to provide recreational facilities. Both sovereigns claim to be motivated solely by an evenhanded policy of letting all comers share in the public provisions (App. 45, 56-8, and 66-7). 37 L.Ed 2d

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22/ While parks and football fields are "generalized services" made available to all, they are not services which are "necessities of life, as electricit water, and police and fire protection." *Cf*. 37 L.Ed. 2d 731.

In the context of Montgomery's attempt to preserve segregation in recreation, the provision of recreational facilities to private segregated schools is just as effective in perpetuating segregation as was Mississippi's provision of free textbooks to such schools. Moreover, it surely would not be suggested that Mississippi could evade the *Norwood* ruling by providing textbooks to all its citizens, directly, thus making the aid "generalized" and given "in common" to all. The effect of supporting private discrimination remains unchanged.

at 732. But as this Court ruled in *Norwood*, "The Equal Protection Clause would be a sterile promise if state involvement in possible private activity could be shielded altogether from constitutional scrutiny simply because its ultimate end was not discrimination but some higher goal." 37 L.Ed. 2d 732.

In two earlier cases panels of the Fifth Circuit recognized the principle that providing state property for use by a private segregated group to be used for a segregated purpose violated the fourteenth amendment.[23/] But the panel below in the instant case added a second factor to the equation — non-exclusive use of the public facilities by a segregated group or school makes the state support acceptable (App. 10a).

The Fifth Circuit has in effect placed its stamp of approval on just a little support, which

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[23/] McNeal v. Tate County School District, 460 F.2d 568 (1972), *mod.* at 574, *cert. den.* 37 L.Ed. 2d 1044 (6-73).

is veiled by the permissive criterion called "non-exclusive use" (App. 10a). Such language is merely another name for substantial support, a standard which petitioners thought had been shaken first in 1972 by this Court's decision in *Wright v. City of Emporia*,[24] and then shattered by Chief Justice Berger's approval in *Norwood* of the language of *Poindexter v. Louisiana Financial Assistance Commissio*

> Decisions on the Constitutionality of state involvement in private discrimination do not turn or whether the state aid adds up to 51 percent or adds up to only 41 percent of the support of the segregated institution.

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[24] 407 U.S. 451 (1972).

[25] 275 F.Supp. 833, 854 (1967), cited with approval in Norwood v. Harrison, ____U.S.____, 37 L.Ed. 2d 723, 732 (1973.

The petitioners see some unsolvable problems in the applicability of an exclusive use doctrine. Use of a part of a public facility is of course exclusive use of that part, but not exclusive use of the whole. Is practice on half the public football field to be allowed, but use of the whole field prohibited? Or does the Fifth Circuit mean exclusive use to be taken literally — any use by a segregated school is to be permitted so long as no one else seeks to use the facility, *i.e.*, so long as no one else is excluded from use?

Yet our more serious reservations go to the substance of the exclusive use test, for it denies plaintiffs relief even after they have once proved their claim of state support for segregated activities. We must show that the state has involved itself with private discrimination by providing its property for segregationist purposes and tacitly placing its stamp of approval on the segregated activities. Yet despite the proven state aid and entanglement,

the Fifth Circuit would permit the city to continue to provide benefits to segregationist academies so long as the benefits are not provided on an exclusive basis. The Fifth Circuit's test allows some state aid to filter down even after the effect and fact of state aid has been proved. The petitioners can find no support for the proposition that the state can do a little but not a lot to aid segregation.

The key issue, we contend therefore, is not the exclusivity of use but whether the city provision of facilities indeed "has a significant tendency to facilitate, reinforce, and support private discrimination," *Norwood*, 37 L.Ed. 2d at 732; the degree of support which the state aid may offer, or the degree of benefit which the aid may confer upon the private academy, is irrelevant. *Id.*[26/] The definition of

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[26/] *Cf.* Moose Lodge v. Irvis, 407 U.S. 163 (1972), where a state liquor license, although conferring great financial benefit on the lodge, was held insufficient state action. This illustrates that it is the character of the state's involvement and whether the state involvement will likely entangle the state in private racist policies which is the test for permissibility of (cont'd

support, as a practical matter, has what we shall term *res ipsa loquitur* overtones. Petitioners take the position that where the facility is publicly owned the desire of the segregated school to use the public recreational facility in and of itself defines support which should be constitutionally prohibited. The sought use must be beneficial to the school's curriculum and program or the school would never seek access to the facility.

There can be no doubt that the government is barred from affirmatively encouraging a private segregated school to use public recreational facilities.[27/] This Court should not allow what would be constitutionally prohibited if actively

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state aid. The grant of a license to a club which discriminates on its own property will not likely entangle the state with, or appear to give state approval to, racist policies largely hidden from public view; organized school-program-oriented use of public properties by private groups flaunting their racist policy on state land is a wholly different situation. *See* pages 72-82 , *infra*.

[27/] Cooper v. Aaron, 358 U.S. 1, 19 (1958).

pursued to be accomplished under the guise of neutrality:

> [A]lthough the State neither commanded nor expressly authorized or encouraged the discrimination, the State had 'elected to place its power, *property* and prestige behind the admitted discrimination' and by 'its inaction . . . has . . . made itself a party to the [discrimination].'

Reitman v. Mulkey, 387 U.S. 369, 380 (1967) [emphasis supplied].

The interests which the Fifth Circuit panel sought to protect through the exclusive use test may be salvaged by focusing a relief decree narrowly on the discriminating private school, as we shall now discuss.

A. Effectuation of School Program As A Barometer For Distinguishing Individual Activities From Private Segregated School Activities

The Fifth Circuit panel expressed concern that individual students should not be penalized in seeking the use of public recreational facilities where that use is unrelated to the activities of the segregated school.[28] Petitioners echo that concern, and none of the relief sought would interfere with the right of the individual citizen to make full and complete use of public recreational facilities.[29]

Nevertheless it is clear that the Court must provide a standard by which individual activity may be distinguished rationally from private segregated school activity. Petitioners have

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[28] App. 10a.

[29] *See* p. 34 , *infra*.

heretofore discussed what constitutes support[30] and have suggested that the desire of the private segregated school to make use of a public recreational facility is the only logical, workable method for pinpointing what is beneficial to the segregated school and thus to be guarded against and prohibited.

The issue of school activity versus individual activity is just as easily ascertainable: look to the genesis of the questioned activity. If the activity can reasonably be traced to the planned curriculum or program of the private segregated school, it is the activity of the private segregationist academy. The segregated school student is not barred from using public recreational facilities so long as that use is not the result of the organized curriculum of the school.[31]

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[30] *Supra*, p. 23.

[31] The Court has not hesitated in other contests to try to draw the line between aid to schools and aid to individual students. *See, e.g.*, Zorach v. Clauson, 343 U.S. 306 (1952).

Common sense leads us to ask three key questions in determining program-oriented activity:

1. Is the activity occurring during school hours?

2. Are school officials accompanying the students?

3. Was the activity arranged by officials of the school?

(The fact that the activity is after school hours is unimportant if either 2. or 3. can be answered affirmatively.) As in the case of support, the test is not how many private segregated school pupils make use of the facility, but whether or not the activity is generated by the school in pursuit of its program goals.

There is a high standard of disassociation which must be achieved by the state in any relationship with a private segregated school; otherwise, that connection will be deemed support. Perhaps the caution with which the government must move can best be demonstrated by viewing the stringent

measures required of public institutions (especially schools) in their avoidance of religious doctrine. *See also Everson v. Board of Education*, 330 U.S. 1 (1946),[32] *Zorach v. Clauson*, 343 U.S. 306 (1952), and *McCollum v. Board of Education*, 333 U.S. 203 (1948). In *Abington School District v. Schempp*, 374 U.S. 203 (1963), state involvement and support was found in school Bible reading even where students were excused from participating or attending.

The first amendment prohibition against establishment of religion requires only state neutrality. There is no "active" opposition to discrimination as that mandated by the equal protection clause of the fourteenth amendment. Surely, if the state must so totally disassociate itself from entanglement

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32/ "No tax in any amount, large or small, can be levied to support any religious activities or institution, . . ." 330 U.S. at 16-17.

with private religious groups, the equal protection obligation seeks even greater precaution against state involvement with private racial discrimination.

The Court made clear in *Norwood v. Harrison*, ___U.S.____, 37 L.Ed. 2d 723, 731, f.n. 7, that the fourteenth amendment prohibition against racial discrimination was not to be considered as flexible as the first amendment warnings regarding religion.[33/] The basis for this distinction is both sound and eminently logical. Racial discrimination "exerts a pervasive influence on the entire educational process," 37 L.Ed. 2d at 733, and the Constitution "places no value on discrimination [while] it does on the value inherent in the Free Exercise Clause." *Id.* at 734.

33/ "The leeway for indirect aid to sectarian schools has no place in defining the permissible scope of state aid to private racially discriminatory schools."

B. Fourteenth Amendment Values Supporting Prohibition Against Use of Public Recreational Facilities by Private Segregated Schools

There is no lack of cases in which this Court has discussed the psychological burden which descends upon all blacks when the government supports or by its action condones segregation of the races. In this case too we are dealing with the psychological burden of an inferior status imposed on a minority race when the government lends its prestige to a discriminatory design. As in *Wright v. City of Brighton*,[34/] the principal harm in this case is not solely that the use of a specific area of land or a physical structure is lost, but that blacks are humiliated because of the particular use to which the property or recreational area is put.

34/ 441 F.2d 447 (5th Cir. 1971), *cert. den.* 404 U.S. 915 (1971).

The petitioners of course complain that they have lost the full or partial use of specific recreational facilities during the time they are used by an all-white school group, but more importantly they emphasize that the more substantial burden stems from the fact that the city has become associated with and has lent its prestige to the private racial discrimination.

The "*constitutional odium of official approval* of race discrimination has no necessary relation to the extent of the States' financial support of a discriminatory institution."[35/] Petitioners in the case *sub judice* are made to suffer the "Constitutional odium of official approval" of racial segregation whenever the city permits the use of its recreational facilities by private segregated schools.

35/ Poindexter v. Louisiana Financial Assistance Commission, 275 F.Supp. 833, 854 (E.D. La. 1967)(three judges), *aff'd* 389 U.S. 571 (1968)(emphasis supplied).

The Court, in *Wright, supra,* where the city sought to sell an unused building to a racially segregated academy, described the burden which the city would have placed on the plaintiffs:

> Whether we call such action the creation of a badge of slavery, . . . a relic of slavery, . . . or a badge of inequality, . . . such a segregated institution is one of the many humiliations which society has visited upon the black man. (441 F.2d at 451).

Desegregation of public recreation facilities dates back almost to the original case of *Brown v. Board of Education*, 347 U.S. 483 (1954). The Court, shortly after the decision in *Brown,* decided *Muir v. Louisville Park Theatrical Assn.*,[36/] in which it

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[36/] 347 U.S. 971 (5-17-54).

at least by implication recognized that the psychological burdens discussed in *Brown*,[37] were equally applicable to segregation of recreational facilities.[38] And only a year later, in 1955, this Court affirmed the Fourth Circuit's decision in *Dawson v. Mayor and City Council of Baltimore City*, 220 F.2d 386 (4th Cir. 1955), *aff'd* 350 U.S. 877.[39] The Circiut Court had spoken directly to the issue of psychological burdens.

> [The Supreme Court] could not base its decision [in *Brown*] on the tangible factors only of a given situation, but must also take into account the psychological factors recognized at this time,

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[37] 347 U.S. 491, 493-495 (5-24-54).

[38] "The judgment is vacated and the cause is remanded in light of the Segregation Cases decided May 17, 1954 [*Brown*], and conditions that now prevail."

[39] *See also* Holmes v. City of Atlanta, 350 U.S. 879 (1955), vacating 23 F.2d 93 (5th Cir. 1955).

including the feeling of inferiority generated in the hearts and minds of Negro children, when separated solely because of their race from those of similar age and qualification. With this in mind it is obvious that racial segregation in recreational activities can no longer be sustained . . .; for if that power cannot be invoked to sustain racial segregation in the schools, where attendance is compulsory and racial friction may be apprehended from the enforced commingling of the races, it cannot be sustained with respect to public beach and bathhouse facilities the use of which is entirely optional. (P. 387).

Surely, almost twenty years following the long overdue emasculation of the doctrine of *Plessy v. Fergurson*,[40] we shall not find ourselves retreating from the certain knowledge that city "neutrality" in the authorization of use of public recreational facilities by private segregated schools and school groups, no less today than then, demeans and ridicules black citizens.

C. Exceptions to Bar Against "Support" of Segregated Schools

Petitioners have contended above that any governmental support authorized to private segregated schools violates the equal protection clause of the fourteenth amendment to the United States Constitution,[41] and further that any support includes any use whatsoever of public recreational facilities, regardless of the exclusiveness of the use.

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[40] 163 U.S. 537 (1896).

[41] P. 23, *supra*.

However, let us concede, *arguendo,* that prior decisions of the Court have recognized certain exceptions to petitoners' claim that any support or service is prohibited. Also, we shall assume that the right of "freedom of association" sustained in *Pierce v. Society of Sisters,* 268 U.S. 510 (1925), limits to some extent services which can be denied to private segregated schools. Against these "exceptions" petitioner will contrast the facts of the case *sub judice.*

The only examples of necessities of life divulged in *Norwood* and *Moose Lodge No. 107 v. Irvis,* 407 U.S. 163, 173 (1972), are electricity, water and police and fire protection.[42/] Failure to provide these services also might accurately be characterized as dangerous

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[42/] Of course *Norwood* suggests that a necessity-of-life service cannot qualify if it is "readily available from sources entirely independent of the State." 37 L.Ed. 2d at 731.

to the public health and safety.[43/]

Public recreational facilities may well enhance the program of a private segregated academy whether it is through the organized school use of football fields, tennis and basketball courts or softball diamonds or curriculum-oriented use, but petitioners doubt that any recreational activity can be placed in the necessity-of-life category. Rather such activity clearly falls within the province of that which is nice to have, but which the segregated school can "live" without. This is true even if one disregards the fact that recreational facilities in most instances are available readily from other sources. Land and equipment are not the private stock of government; segregated schools, like private

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43/ Whether one refers to the service as one which is a necessity of life or which protects the public health and safety, that type service is easily identifiable through "weighing and sifting." For example public streets and public sidewalks are not only necessary for access to and from physical plants but the absence of these services could well endanger public health and safety. No doubt, weighing and sifting might also reveal these services to be available from no other source.

colleges, can build their own recreational complexes.

This view of necessities of life coincides favorably with petitioner's second proposed exception - that any governmental service which would operate as an absolute bar to the existence of the school if withheld, must be provided. Under this theory, *Pierce v. Society of Sisters,* 268 U.S. 510 (1925) would be given its ultimate impact to date. For the head-on confrontation between the right of association for one's children in the school of one's choice and the equal protection duty[44/] of government to guard against racial discrimination in education no doubt would produce a landmark decision. However,

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[44/] It would seem that the stringent affirmative duty to desegregate and to do nothing to frustrate desegregation in former *de jure* districts might well be a telling blow in the hypothetical constitutional battle. *See, e.g.*, Cook v. Hudson, ____F.Supp.____, C. A. No. WC 73-65-K (N.D. Miss. 11-1-73), where the court sustained rule prohibiting employment in the public school system of persons whose children attend private segregated schools.

without laying a basis for support of either result, let us once again assume that the right of private segregated academies to exist prevails even over the affirmative duty of districts under court orders to desegregate their school systems.[45/]

If that assumption is accepted it necessarily follows that the refusal of the city to issue, for example, a license to operate would be an unconstitional act.[46/] (It may be that the necessities-of-life mentioned in *Norwood* and *Moose Lodge* could also be construed as falling within this absolute bar category.) For to deny a school the right to fire and police protection or water and sewerage facilities or lights and heat for the classroom would most surely cause such schools to cease to function just as effectively

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[45/] *See* discussion of affirmative duty, *infra*, p. 50.

[46/] However, licensing may not constitute state action at all where the issuance of the license concerns only activity to be conducted on one's own property at one's own expense. Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Millenson v. The New Hotel Monteleone, Inc., 475 F.2d 736 (5th Cir. 1973), cert. *den.* ___U.S.____, 42 U.S.L.W. 3264 (11-5-73).

as if their operation were made illegal by city ordinance.

It should be clear that even where the above exceptions are adopted and the use of public recreational facilities is measured against these propositio the considerations encompassed therein would not be material to petitioners' complaint. To deny a segregated academy the use, exclusive or not, of public recreational facilities cannot block the school's right to exist. At most the school would be denied merely the facilities to which public desegregated schools have unfettered access. Therefore, the quality of the program and curriculum offered might be affected,[47] but the private segregated academy could continue to function as a school communicating its racist message to its students.[48]

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[47] Of course, this only serves to show what important aid the state recreational facilities are to the segregated academy.

[48] Norwood v. Harrison, ____U.S.____, 37 L.Ed. 2d 723, 733-24 (1973).

Frustration of Court-ordered school desegregation has not been placed in issue at this stage of petitioners' brief,[49/] and need not be considered in order to find the conduct of the city in permitting any support of private segregated schools to be violative of the fourteenth amendment. The Fifth Circuit by its decision below has effectively eroded the concept of equal protection mandated by *Brown* and the principle of exclusivity adopted by the Court is a principle which must be erased if we are to insure that private segregated academies, although permitted their arguable constitutional right to exist, will secure no enhancement of their programs and curriculum from governmental sources.

[49/] For full discussion of the affirmative duty of government to avoid all activity which would frustrate previously ordered school desegregation see p. 50 , *infra*.

III. The Affirmative Duty Placed Upon A City To Desegregate Its Public School System is Unconstitutionally Frustrated When That City Authorizes A Private Segregated School Or School Group To Use Public Recreational Facilities

The fate of private segregated school use of public recreational facilities is doubly sealed where Court-ordered school desegregation is in effect.[50/]

> School boards . . . operating state compelled dual systems were . . . clearly charged [as a result of *Brown v. Board of Education,* (1955)] with the affirmative duty to take whatever steps might be necessary to convert to a unitary school system in which racial

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50/ A comprehensive school desegregation order for Montgomery's public schools, requiring zoned attendance was handed down on February 25, 1970. Up until that time, a freedom of choice plan existed which resulted in little school integration. Carr v. Montgomery County Board of Education, 289 F.Supp. 647 (M.D. Ala., 1968), *aff'd* 395 U.S. 225 (1969); further order entered by District Court on February 25, 1970, (unreported). *Aff'd* 429 F.2d 382 (5th Cir. 1970).

> discrimination would be eliminated root and branch.

Green v. County School Board, 391 U.S. 430, 438 (1968). This view of the affirmative duty imposed on such school systems was reaffirmed in *Keyes v. School District No. 1*, ____U.S.____, 37 L.Ed. 2d 548, 558 (1973), when Justice Brennan found,

> . . . where plaintiffs prove that a current condition of segregated schooling exists. . . the State automatically assumes an affirmative duty . . . to eliminate . . . 'all vestiges of state imposed segregation.'

Following *Green*, but prior to *Keyes*, Chief Justice Burger asserted an identical position in *Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. 1, 15 (1971). Thus, there appears to be little doubt as to the heavy burden placed on public officials to disestablish segregated public school

systems, a duty over and above normal equal protection considerations.[51/]

Petitioners' view as to what constitutes prohibited support differs in no respect from that argument heretofore rendered. The conceptual and legal problems arising from the Fifth Circuit's "exclusive use" doctrine may be stated identically whether petitioners argue "affirmative duty" or basic fourteenth amendment violations. Indeed, the Fifth Circuit promulgated "exclusive use" not so much as it might be applied to the equal protection *sans* affirmative duty argument, but primarily as it would adhere to any question of frustration of prior court desegregation orders.

51/ In McNeal v. Tate County School District, 460 F.2d 568, 571-2 (1972) *cert. den.* ____U.S.____, 37 L.Ed. 2d 1044 (6-73), the Fifth Circuit took note of the dual obligation placed upon a municipality under school desegregation orders. First, there is the general requirement that the government do nothing to enhance or encourage racial discrimination and, second, there is the inflexible command that such a government within a court ordered school desegregation district take affirmative steps to implement school desegregation.

Thus, having defined support considered prohibited and having developed the problems surrounding the Circuit Court's use of exclusivity, petitioners advance to the more narrow issue of the affirmative duty of public officials to desegregate school systems under existing court desegregation orders.

In *McNeal v. Tate County School District*,[52] the Court enjoined the sale of a building made in good faith by a school board[53] to an all-white private school where the school officials were charged with an affirmative duty to establish a unitary school system.[54] The Court further found,

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[52] 460 F.2d 568, 572 (1972).

[53] In the case *sub judice*, petitioners contend and the District Court held, no less duty extends to other local city officials where the local school system is under an order to desegregate its schools. Lee v. Macon County Board of Education, 267 F.Supp. 458 (M.D. Ala. 1967)(three judges), *aff'd* 88 S.Ct. 415 (1968); Poindexter v. Louisiana Financial Assistance Commission, 275 F.Supp. 833 (E.D. La. 1967), *aff'd* 389 U.S. 571 (1968). *See also* Cooper v. Aaron, 358 U.S. 1, 16 (1958).

[54] *Citing* Green v. School Board of New Kent County, 391 U.S. 430 (1968).

> That duty includes making some sort of reasonable investigation of prospective purchasers when school property is sold in an area where it is common practice to establish all-white private schools as a response to court-ordered integration.

The Montgomery public school system is certainly one surrounding in which private segregated schools have arisen with abandon,[55/] and this sudden interest in private schools certainly cannot be attributed to lower tuition. Respondents are under an affirmative duty to investigate and bar from public recreational facilities *all* private segregated school and school groups. *Norwood v. Harrison,* ____U.S.____, 37 L.Ed. 2d 723, 734-5 (1973); *Coit v. Green,* 330 F.Supp. 1150, *aff'd* 404 U.S. 997 (1971)(IRS exemptions).

[55/] App. pp. 34, 61-66.

In *Norwood*, the Court determined that,

> A State's constitutional obligation requires it to steer clear not only of operating the old school system of racially segregated schools but also of giving significant aid to institutions which practice racial or other invidious discrimination.

37 L.Ed. 2d 723, 733 (1973).

Since 1954 the Supreme Court has recognized that racial segregation in public school generates in those children of the minority race a lasting feeling of inferiority which interferes with their motivation to learn. *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954). Judge Wright said in *Hobson v. Hanson*, 269 F.Supp. 401 (D.C. D.C. 1967), appeal dismissed, 393 U.S. 801 (1968), that segregated schools "damage the minds and spirit of all children who attend them . . . and block the attainment of the broader goals of democratic education." The

city action complained of in this case decreases the ability of local school officials to provide equal educational opportunity to black children, because "state encouraged departure of any whites tends to create segregation." *Poindexter v. Louisiana Financial Assistance Commission,* 275 F.Supp. 833 (E.D. La. 1967)(three judges), *aff'd* 389 U.S. 571 (1968). *Cf. Wright v. City of Emporia,* 407 U.S. 451 (1972). In addition to contributing to the reduction of whites in public schools, state aid to private segregated schools may harm petitioners' class in the following ways: (1) by increasing the per pupil cost to the public school system, (2) by decreasing state aid to the public schools where such aid is based on an attendance formula, (3) by increasing the ability of private academies to attract teachers away from the public schools, and (4) by contributing to the loss of influential and active parents who are real assets to the public

school system.[56/] In light of these facts and judicial opinions, the city cannot be heard to say that they have placed no burden on black school children. The city, by enhancing the programs of segregated academies, has inflicted serious injury to petitioners' class in violation of the equal protection clause of the fourteenth amendment, and has breached that affirmative duty to conduct itself so as not to frustrate in any way school desegregation.

IV. City Authorized Use Of Public Recreational Facilities By Private Segregated Schools Constitutes State Action Which Is Prohibited By The Equal Protection Clause of the Fourteenth Amendment

In this section petitioners will deal with the issue of state action as it relates to the activity

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56/ Leeson, *Private Schools for Whites Face Some Hurdles*, Southern Education Report, Nov. 1967, p. 13

of the City of Montgomery in authorizing the use of public recreational facilities by private segregated schools.

Two cases are of paramount importance in defining the limits of the state action concept. *Burton v. Wilmington Parking Authority*[57] and *Moose Lodge No. 107 v. Irvis*[58] set the legal tone against which the "facts and circumstances [of the State's] nonobvious involvement . . . in private conduct" must be sifted and weighed.[59]

In the *Burton* decision this Court dealt with the question of private racial discrimination where the state was only "indirectly" involved. The plaintiffs there brought an action to enjoin a lessee of property owned and maintained by a state

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[57] 365 U.S. 715 (1961).

[58] 407 U.S. 163 (1972).

[59] Burton, *supra*, 365 U.S. at 722.

agency from serving only white persons in his restaurant. The Court held that there was state involvement in the operation of that restaurant sufficient to support an injunction.

In *Moose Lodge*, the plaintiffs sued to desegregate a private segregated club, premising the authority for such an injunction upon a claim of state action achieved *via* the state's granting to the club a liquor license authorizing the sale of alcoholic beverages on the club's own property. The Court found the issuance of a license insufficient to substantiate the claim of state action.60/

Taking these cases in chronological order, petitioners believe *Burton* to be particularly

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60/ *Also see* Millenson v. The New Hotel Monteleone, Inc., 475 F.2d 736 (5th Cir. 1973), *cert. den.* ____U.S. ___, 41 U.S.L.W. 3264 (11-5-73), where issuance of liquor license to bar deemed not to constitute state action.

relevant to the case *sub judice*[61/] because it characterized state participation in the private discrimination not only in terms of what the parking authority did, but what it could have done.

> [T]he Authority could have affirmatively required Eagle to discharge the responsibilities under the Fourteenth Amendment imposed upon the private enterprise as a consequence of state participation. But no state may effectively abdicate its responsibilities by

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61/ The contrast of a "lease" situation with a scheduling or permissive use is a distinction without difference. Petitioners suggest the Court of Appeals in Maryland correctly characterized Burton's meaning. ". . . Certainly it would be most illogical to hold that public officials cannot lease public property for an unconstitutional use, but that they may donate it, or permit its use, for an unconstitutional purpose. Statom v. Board of Commissioners of Prince Georges County, 233 Md. 57, 195 A.2d 41, 47 (1973).

> either ignoring them or by merely failing to discharge them whatever the motive may be. It is of no consolation to an individual denied the equal protection of the laws that it was done in good faith . . . By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, *property* and *prestige* behind the admitted discrimination. (365 U.S. at 725)(emphasis added.)

The facts of the present case are clearly dominated by the state action concept embodied in *Burton;* so that the city's authorization to segregated schools of the use of property owned and maintained by the government violates the fourteenth amendment.

> It is irony amounting to grave injustice that in one part of a single building, erected and maintained with public funds by an agency of the state to serve a public purpose, all persons have equal rights, while in another portion, also serving the public, a Negro is a second-class citizen, offensive because of his race, without rights and unentitled to service . . . (365 U.S. at 724.)

Surely, it is no less ironic that in a portion of a recreational complex "erected and maintained with public funds . . . to serve a public purpose, all persons have equal rights, while in another portion . . . a Negro is a second class citizen, offensive because of his race . . . ."

The movement of a private school group from its own physical school plant onto public recreational facilities in no way changes the character of the

racial discrimination which is the very foundation of the school creed.62/

It was clear that the Court in *Burton* was not concerned with the inconvenience to black people of having to walk farther to get a cup of coffee, but that the root evil was the psychological burden of an inferior status imposed on a minority race when the state lends its prestige and property to a discriminatory design. A black child using a public recreational facility may be accepted as an equal one morning, while the same afternoon at the same facility, he may be treated like a "second class citizen offensive because of his race . . ."

The fact that state officials have pursued a purposeless policy and that the actual discrimination has occurred at the hands of private individuals has never been viewed by the courts as a significant

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62/ "[i]ts educational processes are based on private belief that segregation is desirable in education." Norwood v. Harrison, ____U.S.____, 37 L.Ed. 2d 723, 733 (1973).

factor in determing the constitutionality of state action. In *Shelley v. Kraemer,* 334 U.S. 1, 20 (1948), this Court declared unconstitutional the judicial enforcement by state courts of restrictive covenants based on race. It held that the fourteenth amendment is not "ineffective simply because the particular pattern of discrimination, which the State had enforced, was defined initially by the terms of a private agreement." The Constitutional prohibition is not restricted to cases where the state enforces private discrimination. In *Reitman v. Mulkey,* 387 U.S. 369 (1967), the Court assessed the constitutionality of Article I, Section 26 of the California Constitution which protected the complete discretion of real property owners to decide to whom they would sell, lease, or rent such property. While conceding that the State was permitted a neutral position with respect to private racial discrimination, the Supreme Court affirmed the judgment of the California Supreme Court, which had

held the section unconstitutional, because the California court "assessed the ultimate impact of Section 26 in the California environment and concluded that the section would encourage and significantly involve the State in private racial discrimination contrary to the Fourteenth Amendment." *Id.* at 376.

The actions of the City of Montgomery in the present case unquestionably enhance the curriculum and programs of the private segregated academies, thereby having the effect of encouraging "white flight" from the public system. If the private segregated schools can offer athletic and cultural advantages supplied by public recreation, what advantage, for those who desire a segregated system, is to be gained from support of the public school system? Not only is such activity prohibited by basic equal protection considerations, but it is totally without redemption when considered in light of the heavy affirmative burden imposed upon officials to

desegregate the public school system and to permit no frustration of court orders.

Thus, under the *Burton* theory of state action there would seem to be little doubt as to the existence of state action in the case *sub judice*. However, respondents, in the Court below, and presumably before this Court, have argued and will argue that *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), greatly increases the degree of state activity required to reach that illusive quality known as "state action."

Petitioners consider *Moose Lodge* to substantiate their position and to assist in more clearly defining what the Court believes state action *not to be*. That case centered on the issue of whether there was state action in a private club's racial discrimination on its own property while the case *sub judice* deals with private segregated school discrimination on city property.

It is petitioners' contention that *Moose Lodge* clearly stands for the proposition that the granting

of a license to serve liquor on one's own property is not state action. It is the character of the state activity to which the Court addressed itself, not the amount of effort which went into issuing the license to the Lodge or the degree to which the club was benefitted.[63/] State licensing under the facts of *Moose Lodge* is not state action, said the Court.

Petitioners are not trying to open "white flight" private academies to black students as *Irvis* was trying to open the Moose Lodge. We are not concerned here with how the white academies run their own privately owned property — let them build their own recreational facilities if they believe them to be an attractive addition to their school programs and petitioners will offer no objection. What petitioners find abhorrent is the use of *public* land and public facilities to support and complement

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63/ *Cf.* note 26, *supra*.

the white academies' curriculum and organized programs.[64]

The city's view of *Moose Lodge* rests upon the Court's statement that the provision of state services would not alone involve the state sufficiently in private discrimination to make private acts state action.[65] The problem with this representation of the Court's holding is that it omits any reference to the entire remainder of the Court's opinion, and the extensive pains to which the Court goes to distinguish *Burton v. Wilmington Parking Authority*.[66] Since *Burton* was a case in which state involvement in private discrimination was found, the *Moose Lodge* Court's discussion of *Burton* shows the distinguishing

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[64] Such a situation is doubly offensive when the city is under an affirmative duty to achieve a unitary school system. The *Moose Lodge* decision would be critical, therefore, only if Pennsylvania had been under court order to serve blacks at its state-owned clubs and had thereafter granted liquor licenses to discriminating private clubs. But, of course, Pennsylvania was under no such court order — and had it been under such an affirmative duty to desegregate its public bars, the granting of a liquor license to a private club would have presented a substantially different case.

[65] Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 177 (1972).

[66] *Id.* at 174-5.

facts in each case.

The petitioners contend that the city's grant of its own public lands and facilities for the use of discriminatory private schools is substantially different from a private club's discrimination on its own premises. The *Moose Lodge* Court's treatment of *Burton* supports this view, for the Court quoted extensively from the earlier case to show that in the parking authority situation the

> "land and building were publicly owned. As an entity the building was dedicated to 'public uses' in performance of the Authority's 'essential governmental functions.' The costs of land acquisition, construction, and maintenance are defrayed entirely from donations by the City of Wilmington, from loans and revenue bonds and from the proceeds of rentals and parking

> services out of which the loans and bonds were payable.[67]

The Court went on to contrast that situation with the one before it in *Moose Lodge:*

> Here there is nothing approaching the symbiotic relationship between lessor and lessee that was present in Burton . . . Unlike Burton, the Moose Lodge building is located on land owned by it, not by any public authority.[68]

Moose Lodge does not signal the wholesale retreat from the mandate of the fourteenth amendment some seem to suggest. The Fifth Circuit did not contest

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[67] *Id.* at 174, *quoting* Burton v. Wilmington Parking Authority, 365 U.S. 715, 723-24 (1961).

[68] *Id.* at 175. *Cf.* discussion of symbiotic relations, *infra,* p. 76.

petitioners' contention that city authorized use constituted state action, but in fact adopted that position with respect to segregated non-school organizations. It then found the right to freedom of association to be adversely affected and overriding when balanced with fourteenth amendment proscriptions (App. 15a).69/

V. City Authorized Use Of Public Recreational Facilities To Private Segregated Non-School Organizations And Clubs Violates The Equal Protection Clause Of The Fourteenth Amendment

Thus far, petitioners have isolated their argument in order to confront only the issue of governmental support to private segregated schools. Two theories of attack on the city's policy of permissive use of recreational facilities were advanced.

69/ Petitioners will deal with the non-school findings of the Fifth Circuit in section V, below. The Appellate Court did not discuss "state action" with respect of private segregated academies. *See* App. 9a.

First, the city cannot, as a fundamental principle of equal protection, authorize support to a segregated institution by enhancing its curriculum or program. Second, city officials, in an area under school desegregation orders, are under an affirmative duty to achieve a unitary school system, and any action or inaction which frustrates this goal is violative of that affirmative obligation.

Practical determinants as to how one can define support were suggested; enhancement of the segregated school curriculum or program being the key. A *res-ipsa-loquitur*-type test of enhancement was also proposed — if the school desires the use of the facility, authorization would obviously complement the school's program.

Further, petitioners recognized, *arguendo*, two exceptions to the prohibition against the authorizatio by the city of governmental services. First, the city cannot withhold necessary services, unavailable elsewhere, the lack of which would impede public health

and safety, *i.e.*, fire and police protection. Second, the city cannot withhold any service where such refusal would constitute a bar to the very existence of the school (*e.g.*, license to operate). The flexibility exhibited in the latter exception would be mandated by the fundamental constitutional principle of freedom of association, while the necessities of life considerations were first recognized in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173 (197) and reaffirmed in *Norwood v. Harrison*, ___U.S.____, 37 L.Ed. 2d 723, 731 (1973).

There is little petitioners have previously asserted with respect to the fourteenth amendment prohibition against governmental support of private segregated schools which is not equally applicable to city support of private segregated organizations and clubs. The conceptual issues of equal protection are the same. It is only the burden of court ordered school desegregation and the resulting affirmative duty argument which could distinguish private

segregated schools from private segregated organizations and clubs. Therefore, petitioners adopt their entire school equal protection argument (*sans* "affirmative duty") as to non-school organizations.[70/]

Similarly, the foregoing state action discussion is equally viable in considering the extent to which a city may constitutionally involve itself in private organizational conduct.

Petitioners recognize the factual difference which, in the case *sub judice*, give rise to the legal distinctions between city relationship with private segregated schools and private segregated clubs and organizations.

The mere existence of private segregated clubs and organizations in no way frustrates any duty on

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70/ As Justice White (dissenting) stated in Palmer v. Thompson, 403 U.S. 217, 252 (f.n. 10) "I agree fully with the majority that if a city or state became involved any way in the operation of facilities on a segregated basis by private parties, the Fourteenth Amendment is violated."

the part of public officials to desegregate recreational facilities in Montgomery.[71] There does, however, exist on the part of city officials an affirmative duty to desegregate previously segregated public recreational facilities.[72] The authorization of private organization use of such facilities is a violation of that duty, for once that organization plans an activity and removes itself, in whole or in part, from its private location to a public facility, the city's duty is clear. Enclaves of segregation in previously segregated recreational facilities, now under Court order, surely must frustrate the thrust of the Court's prior orders — public recreational facilities must be operated on a desegregated

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[71] Certainly, the city is under Court orders to desegregate its public recreation complex, but unlike the private school situation no one is fleeing *public* clubs and organizations to establish such clubs on a private basis. Gilmore v. City of Montgomery, 175 F.Supp. 776 (M.D. Ala. 1959); Further Order entered, 1-29-71 (unreported) Smith v. YMCA, 316 F.Supp. 899 (M.D. Ala. 1970), *aff'd* 462 F.2d 634 (5th Cir. 1972).

[72] *Id.*

basis or equal protection cannot prevail.

Thus, it is clear that petitioners are basing their argument as to private non-school organizations on the fundamental principle of equal protection, and it now becomes necessary to focus on the reasoning of the Fifth Circuit in concluding that the fourteenth amendment had not been offended.

The Fifth Circuit interpreted this Court's decision in *Moose Lodge No. 107 v. Irvis*[73] to be an absolute bar to any equal protection argument which might be advanced to defeat city authorization of private organization use of public recreational facilities.

The Court supported this position by distinguishing *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), and the case *sub judice* vis a vis *Moose Lodge*. It first found that the "symbiotic relationship" mentioned in *Moose Lodge* with respect to *Burton* was

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[73] 407 U.S. 163 (197).

[74] App. 15a.

not present in the "periodic use of recreational facilities"; and second, that freedom of association was violated by an injunction which disallowed the use of public property by private groups with an affirmative policy of racial segregation.

The Circuit Court's reading of *Moose Lodge* lends a great deal more weight to "symbiotic" than appears to be intended by Justice Rehnquist. It is logically appropriate in the context of the *Moose Lodge* facts, but nowhere does the Court intimate that symbiotic is to be read as an essential element in measuring the existence of state action. Only once in the Court's opinion is "symbiotic" used.

> Here there is nothing approaching the symbiotic relationship between lessor and lessee that was present in Burton, where the private lessee obtained the benefit of locating in a building owned by the state-created parking authority was enabled to carry out

> its primary public purpose of furnishing parking space by advantageously leasing portions of the building constructed for that purpose to commercial lessees such as the owner of the Eagle Restaurant. (P. 175).

Indeed, viewed in the context of the Court's opinion symbiotic is merely descriptive of the situation the Court found in *Burton*, and Justice Rehnquist only says that the facts in *Moose Lodge* do not even approach the close relationship of *Burton*. The emphatic point made by the Court is not symbiosis but the contrasting, several lines later in the same paragraph, of a public restaurant in a public building with a private club in a private building.

It should be noted, moreover, that absolutely no symbiotic relationship, as described in *Moose Lodge*, exists in the facts of *Norwood v. Harrison*, ____U.S.____, 37 L.Ed. 2d 723 (1973), where the

Court found equal protection violations not only on the narrow issue of frustration of public school desegregation, but also on the basic fourteenth amendment principle that the state cannot give aid which "has a significant tendency to facilitate, reinforce and support private discrimination."75/

Nevertheless, let us assume *arguendo* that "symbiotic relationship" is a phrase as omnipotent as respondents would desire. "Symbiosis" is defined as a living together of two dissimilar organisms in close association, advantageous to both.76/

Certainly for the period to time when a public recreational facility is being used by a private segregated organization there is the close association required. Mutual benefit can only be defined by looking to the goal which each entity sought to to achieve by its activity. In *Burton*, the authority established the building for the purpose of making

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75/ 37 L.Ed. 2d at 732 (1973).

76/ Webster's New Twentieth Century Dictionary, Unabridged, Second Edition, p. 1847.

money. Eagle served its purpose and derived an income from his restaurant operations. Here, the recreational facility was established to offer a place for public recreational activity; *e.g.*, baseball, tennis, golf, etc. The private segregated club takes advantage of the offer to perform one of its functions and the city's purpose is served. Benefit need not always be defined in terms of financial remuneration to each party.[77]

The Fifth Circuit also found continuing use to be a material element in establishing "symbiotic relationship."[78] Let us assume that the dining space

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[77] Norwood v. Harrison, ____U.S.____, 37 L.Ed. 2d 723 (1973); Smith v. YMCA, 462 F.2d 634 (5th Cir. 1972), where there was no financial benefit to State in either case. A promise for a promise is considered aedquate consideration in a contracts context. Stone v. U. S., 94 U.S. 42, 45 (1877). *See also* Corbin, Contracts, Section 25 and Restatement of Contracts, Section 90, to illustrate quid pro quo aspects of consideration where something less than money is involved.

[78] The Circuit Court obviously felt that "periodic use" generated a significant effect on the existence of symbiosis as used by it in distinguishing *Burton* and *Gilmore*. (App. 15a.)

in *Burton* were leased to Eagle only every third week and that owners not practicing racial discrimination operated the other two weeks. Would that affect the finding of the Court in *Burton?* Let us suppose that Eagle operated only a rolling coffee cart, which, from time to time, he was permitted to operate in the building and that he refused to serve blacks. Would solely the time factor leave the fourteenth amendment stripped of power to bar his segregated operation? Petitioners think the answer to both hypotheticals is in the negative. Periodic or occasional violations of the fourteenth amendment are just as forbidden as systematic violations.[79/]

As evidenced by petitioners' argument above,[80/] we do not contest the right of persons to associate privately in organizations and clubs. However, freedom of association is not at issue here.

[79/] *See*, Snowden v. Hughes, 321 U.S. 1, 15 (1944) (Frankfurter, J., concurring).

[80/] *See*, pp. 73-4, *supra*.

The issue is whether the city may complement the organized program of private segregated groups by authorizing the use of public recreational facilities? The club members may band together and conduct their affairs privately in any way they wish — however the public is not required either to support their functions or to be subjected to their affirmative racist policies in publicly owned and operated recreation areas.81/

81/ "A park . . . is the very sort of facility which gives every appearance of state participation in or approval of the discriminatory design." Commonwealth of Pennsylvania v. Brown, 270 F.Supp. 782 (E.D. Pa. 1967)*aff'd* 392 F.2d 12 (3rd Cir. 1968), *cert. den.* 391 U.S. 921 (1968)(dictum). It should be clearly understood that petitioners do not seek relief which would infringe the first amendment rights of clubs and organizations to use public recreational facilities in order to carry out a First Amendment goal — even if that goal is to express racist views. However, where the goal of the club or organization is to play softball the attendant policy of racial segregation in admissions affords no protection against the constraints of the fourteenth amendment.

CONCLUSION

For the reasons stated above the named plaintiffs and the class which they represent ask that the judgment of the Circuit Court be REVERSED, that the doctrine of "exclusive use" be abandoned and that city recreational support of private segregated non-school groups and organizations be found violative of the equal protection clause of the fourteenth amendment.

Respectfully submitted,

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ADDENDUM

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Georgia Theresa Gilmore, et al.	)	
	)	Civil Action
vs.	)	
	)	No. 1490-N
City of Montgomery, Alabama, a Municipal Corportation; et al.	)	

MEMORANDUM TRANSCRIPT: From hearing held in above case at Montgomery, Alabama, November 20, 1970, before Hon. Frank M. Johnson, Jr., Judge: To show remark of the Court near conclusion of hearing pertinent to plaintiffs' proof.

THE COURT: All right; I will reserve two days, January 18 and 19, to complete the trial of this case, and it looks like it will take that much. Is there any -- is there any hardship being worked on either the plaintiffs or the defendants by continuing the trial of this case?

MR. MORRIS S. DEES, JR.: Your honor, no more hardship than has been worked for the past ten years, and I don't think that will make that much difference in the next two months.

THE COURT: Well, that is argument; that is argument.

MR. DRAYTON N. HAMILTON: We object to his statement -- Judge, the only thing we are concerned with is that there -- and we don't know, and the other day we didn't know, either, about the deadline on moving the Semple house.

THE COURT: We are not going to spend any more money on predominantly white parks until I render a decree in this case; because the plaintiffs, up to this point, have made an extremely strong case of denial of equal protection. I am not deciding the case, because I haven't heard your evidence --

MR. HAMILTON: Right, I understand.

THE COURT: -- but we are not going to spend any money on white parks or close any black parks until

this case is submitted. If you want a formal order on that --

MR. HAMILTON: We have no intention of closing Kiwanis Park, your honor.

THE COURT: I know -- I know this house; I just looked into the house and checked the status of it; we are going to let it stay just like it -- we are not going to convert Kiwanis Park to a museum for antique houses or something until I decide this case.

MR. HAMILTON: Well, like I said, the only point I had was there is a possibility that we will be required to do some -- make some disposition of the house; we were interested in --

THE COURT: Well, put it somewhere else; we are not going to take that park over under the present status of this case.

* * * * * * * *

I hereby certify that the foregoing is a full true, and correct transcript of notes taken by me in above matter, covering requested colloquy as shown, on the 20th day of November, 1970.

/s/ Glynn Henderson
Official Court Reporter

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Emerson, Freedom of Association and Freedom of Expression, 74 Yale
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Gunther, The Supreme Court 1971 Term,
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Harvard Law Review, Vol. 73,
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Iowa Law Review, Vol. 58, p. 108 (1973) 24, 37

Mississippi Law Journal, Vol. 44,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1517

GEORGIA THERESA GILMORE, GUSSIE CARLTON, SYLVIA JOHNSON, J. C. SMITH, MATTIE CARGILL, FRED HARRIS, GEORGE STEPHENS, ELIZABETH BROWN, on behalf of themselves and all others similarly situated,

PETITIONERS,

—v.—

CITY OF MONTGOMERY, ALABAMA, a Municipal Corporation; BOARD OF COMMISSIONERS OF THE CITY OF MONTGOMERY; JIM ROBINSON, CLIFF EVANS and J. B. RUCKER, as Members of the Board of Commissioners of the City of Montgomery; RECREATION BOARD OF THE CITY OF MONTGOMERY; RUFUS A. LEWIS, JEAN B. CAMPBELL, JAMES HALL, MUREAL R. CRUMP, CHARLES STAKELY, CHARLES W. ROSS and JAMES E. VICE, JR., as Members of the Recreation Board of the City of Montgomery; HENRY M. ANDREWS, as Superintendent of the Parks and Recreational Program for the City of Montgomery, Alabama,

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. WHETHER PRIVATE ORGANIZATIONS INCLUDING CHURCH, CIVIC, FRATERNAL AND CHARITABLE GROUPS MAY USE AND ENJOY PUBLIC RECREATIONAL FACILITIES WITHOUT REGARD TO THE RACIAL ADMISSIONS POLICIES OF SUCH PRIVATE ORGANIZATIONS?

2. WHETHER THE CONSTITUTION PROHIBITS THE USE AND ENJOYMENT OF PUBLIC RECREATIONAL FACILITIES, IN COMMON WITH OTHER MEMBERS OF THE PUBLIC, BY INDIVIDUAL CHILDREN OR GROUPS OF STUDENTS WHO MAY BE ENROLLED IN SEGREGATED PRIVATE SCHOOLS?

STATEMENT OF THE CASE

The original decision in this class action litigation was entered by the United States District Court for the Middle District of Alabama on September 9, 1959.[1] The plaintiffs, on behalf of themselves and other similarly situated Negroes in Montgomery, Alabama,

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1. Gilmore, et al. v. City of Montgomery, 176 F. Supp. 776 (M. D. Ala. 1959).

had prayed that the defendant City officials, including the members of the Parks and Recreation Board of the City of Montgomery be "permanently enjoined from making any distinction on account of race or color in extending and granting the right and privilege of admission to and use of Oak Park or any other public park. . ."[2] The trial court granted the relief requested by the plaintiffs and the Court of Appeals for the Fifth Circuit affirmed with the modification that the District Court should "retain jurisdiction of this case for such reasonably long period as may appear to be advisable." (277 F. 2d 364, 368) Thereafter the City has operated all public recreational facilities and parks on a non-discriminatory and desegregated basis.[3]

In a "Motion for Supplemental Relief" filed on September 8, 1971 the petitioners asked the District Court to:

> "Issue a permanent injunction against defendants, their officers, agents, servants, and employees, restraining them from allowing or in any way sanctioning the use of City owned and operated recreational facilities by any private school, group, club or organization which is racially segregated or which has a racially discriminatory admissions policy."

The petitioners in support of their prayer in the Motion for Supplemental Relief alleged that the City

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2. See excerpt as set forth in Circuit Court Opinion, City of Montgomery v. Gilmore, 277 F. 2d 364 at p. 366.

3. Effective January 1, 1959 which was prior to the original Order of September 9, 1959 and for some time thereafter the City operated no parks. When the facilities were reopened they were and have continued to be operated on a completely desegregated and non-discriminatory basis.

had a "practice and policy of permitting any private school or club, even if the school or club is racially segregated to use available City recreational facilities and that Negro individuals were unknowingly forced to subsidize racially segregated schools and organizations. (App. 15; App. 19)

In answer to the 1971 petition, the City set forth that all municipal recreational facilities throughout the City of Montgomery were, in fact, open to all on an equal basis with people of the community all having equal access thereto, without regard to race or color. (App. 55; App. 58) The answer of the City specifically denies any discrimination between racial groups with regard to the availability of recreational facilities. (App. 57) These respondents deny that they engage in any practice which fails to give Negroes protection equal to that afforded to whites. (App. 57)

The "Motion for Supplemental Relief" was submitted to the District Court upon the pleadings, stipulations and briefs.[4] (App. 18a) The District Court on January 18, 1972 issued an order which is essentially in two parts. Paragraphs 1 and 2 deal with private schools and school affiliated groups while Paragraphs 3 and 4 deal with non-school private clubs, groups and organizations. These portions of the District Court Order are as follows:

"1. That the City of Montgomery, Alabama's policy and practice of permitting the use of city owned or operated recreational facilities by any private school, or private school affiliated group, which

4. *Gilmore v. City of Montgomery*, (M. D. Ala. 1972) 337 F. Supp. 22, 24.

school or group is racially segregated or which has a racially discriminatory admissions policy be and the same is hereby declared unconstitutional.

2. That said City of Montgomery, Alabama, its officers, agents, servants, employees, and those acting in concert with it, be and each is hereby enjoined from permitting or in any way sanctioning the use of city owned or operated recreational facilities by any private school, or private school affiliated group, if such school or group is racially segregated or if it has a racially discriminatory admissions policy.

3. That said City of Montgomery, Alabama's policy and practice of permitting the use of city owned or operated recreational facilities by any private group, club or organization which has a racially discriminatory admissions policy be and the same is hereby declared unconstitutional.

4. That said City of Montgomery, Alabama, its officers, agents, servants, employees and those acting in concert with it, be and each is hereby enjoined from permitting or in any way sanctioning the use of city owned or operated recreational facilities by any private group, club or organization which is not affiliated with a private school and which has a racially discriminatory admissions policy." (337 F. Supp. 22, 26; App. 25a and 26a)

It is noted that the District Court in the relief granted made a distinction between private schools as compared with private groups "other than those affiliated with schools." In this regard the District Court held:

"Whereas state and city officials are under an affirmative obligation to end discrimination in situations involving education, this affirmative duty does not extend to cases involving private groups other than those affiliated with schools." (App. 24a-25a; 337 F. Supp. 22, 25)

The City appealed to the Circuit Court of Appeals for the Fifth Circuit from the aforementioned order of the District Court. (App. 69) Pending appeal the District Court by agreement of the parties stayed Paragraphs 3 and 4 of the above order which deal with private groups, clubs and organizations which are not affiliated with a private school. (App. 74-75)

The Court of Appeals affirmed with modification the first portion of the District Court order dealing with private schools and school affiliated groups (Paragraphs 1 and 2).

The modification by the Court of Appeals was to "make clear" that the District Court order should not be read to prohibit the "communal use" of such public recreational facilities as zoos, museums and parks, by private school students in common with other members of the public or to prohibit such students from attending along with other citizens, civic and cultural events conducted in City recreational facilities. (App. 16a; App. 10a; 473 F. 2d at pp. 839-840, and 837) The Court of Appeals in the first portion of its thorough mandate makes it very clear that the respondents, in accord with the order of the District Court, are, however, enjoined and restrained from making public recreational facilities available to private schools or to private school affiliated groups.

The Court in this regard specifically states: ". . . we hold that the findings and conclusions of the court are supported by the record and are sufficient to sustain that portion of the injunction which forbids scheduling athletic contests and similar functions which involve segregated private schools in municipal facilities. (App. 9a-10a; 473 F. 2d at p. 837) The Court of Appeals held that this rule applied to private schools with open admissions policies if such schools have all white enrollments.

"Therefore, we affirm the decision of the district court not to distinguish among segregated schools on the basis of their admissions policies." (App. 12a; 473 F. 2d at p. 839)

The Court of Appeals reversed the second portion of the order dealing with private non-school groups, clubs and organizations (Paragraphs 3 and 4 as set forth above) and directed these portions to be deleted.

The Court of Appeals with regard to such non-school groups held:

"While the injunction against private school usage is based upon the affirmative obligation of public authorities to eliminate educational segregation, the injunction against similar usage by non-school organizations must rest, if at all, upon a general constitutional prohibition against state sponsored racial segregation . . ." (App. 13a; 473 F. 2d at p. 838)

"Where there is no significant effect on the countervailing rights of excluded individuals, such private groups cannot be denied access [to] public

recreational facilities solely because of their discriminatory admissions policies." (App. 15a; 473 F. 2d at p. 839)

In accordance with the order of the Court of Appeals, the District Court on remand amended the injunctive order by "deleting Paragraphs 3 and 4 relating to private, non-school groups and organizations" and by amending Paragraphs 1 and 2 of said injunctive order by adding: "The injunction issued by this Court does not prohibit the City of Montgomery from permitting non-exclusive access to public recreational facilities and general government services by private schools or school affiliated groups."[5]

It is from the order of the Court of Appeals that petitioners filed a Petition for a Writ of Certiorari in the Supreme Court of the United States. The petition for writ of certiorari was granted October 15, 1973.

STATEMENT OF FACTS

The stipulation upon which the instant case was submitted to the District Court includes the following statement of agreed facts:

"Municipal recreational facilities in the City of Montgomery are not exclusively leased to any particular group and such facilities are not made available exclusively to any particular group. Football, basketball and baseball facilities are made available to groups who make application therefor on a non-discriminatory basis without regard to race or color,

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5. Order of District Court dated March 19, 1973. App. 28a-29a.

including such private groups as churches, athletic leagues, civic clubs, charitable organizations, and educational institutions, without regard to race or color. Athletic participation which is sponsored by the [Municipal] Parks and Recreation Board, i.e., junior high school age football teams, are given preference in facility scheduling. All municipal recreational facilities throughout the City of Montgomery are open to all on an equal basis with people of the community all having equal access thereto, without regard to race or color." (App. 66)

The respondents by answer to interrogatory in the District Court state: "The Parks and Recreation Department (of the City of Montgomery) make all recreational facilities available to the public generally and to organized groups for athletic competition upon application being made therefor and upon the prescribed fee being paid." (App. 49) It was further established through answer to interrogatory that publicly sponsored programs are given preference in facility scheduling. (App. 50)

Accordingly, the District Court specifically found that the respondents make recreational facilities available on a non-discriminatory basis to all private groups which apply for them including schools, churches, civic clubs and charitable organizations. (App. 18a, 337 F. Supp. at p. 24) The District Court made no findings concerning the history, frequency or effects of public recreational facilities by such non-school affiliated private organizations. This was specifically noted by the Court of Appeals together with the finding: "Furthermore, in this case which was tried on stipulated facts, nothing was stipulated which

would support this prong of the injunction." [with regard to non-school private groups—i.e., Paragraphs 3 and 4 of District Court order] (App. 13a; 473 F. 2d at p. 838, note 12)

It is a matter of public record that the City of Montgomery now provides a wide variety of recreational services on an open and non-discriminatory basis involving fully and heavily integrated programs.[6] These programs include a desegregated Golden Age Club for the elderly, desegregated pre-school activities for youngsters and desegregated community activities for all ages. Auditoriums and meeting room facilities are available throughout the City on a non-discriminatory basis to all groups and clubs with the exception of segregated private schools. This practice with the private school prohibition was permitted pursuant to the stay as granted by the District Court and is now permitted under the decision of the Court of Appeals.

Since the order of the District Court, the respondent officials have not permitted segregated private schools or school affiliated groups to use any muni-

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6. Reports filed with the District Court on December 29, 1972 and July 29, 1973.

In addition the respondents conduct a fully integrated summer program wherein deprived and underprivileged children throughout the community are picked up at their homes and transported throughout the City for attendance in such programs as arts and crafts, swimming, athletic events, games etc.

It is a matter of public record that the respondent board has received "excellent" ratings from the United States Department of Economic Opportunity and from the Department of Labor for their implementation of the summer recreational programs and from the United States Department of Agriculture with regard to the summer food program.

cipal recreational facilities. Pursuant to the decision of the Court of Appeals the respondents have not attempted to prohibit the use and enjoyment of public recreational facilities by individual children who may be enrolled in private schools, when the usage by such children is in common with the rest of the public and in common with all other children throughout the community. For example, when the museum is open, students who may be enrolled in private schools may attend along with other children or when a civic or cultural event is scheduled for public attendance, such is open to all including students who may be enrolled in private schools. As a matter of fact, these respondents have no way of ascertaining which children are enrolled in private schools and which ones attend public institutions.

The City has specifically prohibited all-white private schools and such private school affiliated groups from scheduling any athletic events or similar school functions whatsoever at public facilities. When, however, a facility is open to the public for public attendance, individual children are allowed to attend even though it may be that they are enrolled in a private school. Such attendance, of course, is in common with the attendance by other members of the public. On the other hand, private schools and private school affiliated groups are not allowed to reserve or to engage any municipal facility for their own use. This is in accord with the mandate of the Court of Appeals and is being effectively administered by the respondent officials.

The petitioners refer to past "segregationist" practices of the City of Montgomery and list several

citations involving schools and other areas of desegregation. Montgomery, Alabama, has, in fact, been judicially recognized at every level of the Federal Judiciary—the United States District Court, the Court of Appeals for the Fifth Circuit and the United States Supreme Court—for the professional manner in which the often trying problem of desegregation has been handled and effectively implemented in this community.[7] The Supreme Court of the United States through Mr. Justice Black has commended the attitude of this community toward accomplishing constitutional mandates of desegregation.[8]

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7. The Court of Appeals for the Fifth Circuit in the case of *Carr v. Montgomery County Board of Education*, 429 F. 2d 382 (1970) specifically noted:

> "11. 'This is not the first time an appellate court has taken note of the exemplary record of this district judge and the responsiveness of this school board. On the only previous appeal from a desegregation order affecting Montgomery County, both this court and the Supreme Court adverted to these factors. See Montgomery County Board of Education v. Carr, 5 Cir. 1968, 400 F. 2d 1 (opinion by Judge Gewin, noting the good faith of the Board and quoting complimentary remarks by Judge Johnson concerning the Board); United States v. Montgomery County Board of Education, 1969, 395 U. S. 225, 89 S. Ct. 1670, 23 L. Ed. 2d 263 (opinion by Mr. Justice Black, commenting favorably upon the performance of the judge and the Board.'" (429 F. 2d at p. 387).

During a stage of these proceedings petitioners petitioned the Court for a remedial order concerning a track at Carver School. The District Court recognized the efforts of these respondents and denied the motion of petitioners for attorneys' fees: "Upon consideration of this litigation and particularly this phase thereof" —order of District Court dated May 30, 1972.

8. *United States v. Montgomery County Board of Education*, 395 U. S. 225, 23 L. Ed. 2d 263, 89 S. Ct. 1670.

It is a matter of public record and public knowledge in Montgomery, Alabama that the Park and Recreation Board of the City of Montgomery is now integrated. Two of the respondents now before this Court as members of the Park and Recreation Board of the City of Montgomery are black. (Messrs. Rufus A. Lewis and James Hall—the vice chairman and immediate past vice chairman, respectively, of the respondent Board) These men are leaders in the black community and are singularly representative of the class sought to be represented by the petitioners. In addition, the superintendent of recreation for all recreational programs throughout the City of Montgomery is a black man, Mr. Percy L. King.[9] The appointment of these black representatives was voluntarily accomplished by the respondent officials, and stands as marked and documentary evidence of the progressive attitude of this community in the area of civil rights, as previously recognized by Mr. Justice Black.

It is documented in the District Court[10] that the City of Montgomery pursuant to the agreement made during January, 1970, is now completing an extensive program whereby new public community centers are available to all of the public throughout all parts

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9. Article entitled "King to Head City Parks Department", Montgomery Advertiser, August 9, 1973—In addition to Mr. King the Board employs Negroes throughout the Recreation Department. For example, under Mr. King there are two area supervisors, one of which is black, who direct biracial staffs in municipal recreation programs without regard to race or color.

10. Detailed reports filed in the District Court on December 29, 1972 and July 29, 1973.

of the City. For example, McIntyre Community Center, which will be completed in January of 1974 will include an outdoor twenty-five yard six-lane Olympic swimming pool, gymnasium, clubrooms, arts and crafts rooms, game rooms, offices, snack bar, exercise room, lobby and will be completely air-conditioned. This community center will be the largest and most elaborate in the City of Montgomery and is in a low-income and black residential area.[11] The Hayneville Road Park and Community Center is, in fact, being dedicated and opened this week (December 19, 1973) with clubrooms, recreational areas and a fourteen-acre park site.[12] Playground facilities and an all-purpose recreational court will be provided, with picnic shelters to be added at a later date. This park is also in a low-income and black residential area and will include playground equipment, outdoor basketball courts, and comfort stations. Community centers now exist throughout the City and extensive work has been done, for example, in up-grading and refurbishing play areas in the Carver area, Goode Street, Washington Park, Kings Hill and Booker-Washington areas. Smaller open-space recreational areas are being finalized adjacent to and in connection with low rent housing projects in the City and in other low-income and black areas. For example, a fifteen-acre site is being developed for the G. W. Smiley housing area

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11. Report filed with the District Court on December 29, 1972.

12. Article appearing in *Montgomery Advertiser* on December 19, 1973; also noted in *Alabama Recreation and Park News*, Vol. No. 3 at p. 13—reference to appointment of Mr. King also noted in this publication.

which will include ball fields, play areas and a swimming pool.[13]

These improvements were made pursuant to the plan voluntarily submitted by the City of Montgomery during January of 1970.

In addition to the above enumerated improvements, plans have been recently finalized and made public which show that within the next twelve months a large public recreation area is to be constructed in an area of Montgomery which is easily accessible to all races.[14] The land has been acquired for this development and funding is being secured for the construction of a public 18-hole golf course, swimming pools, bicycle trails, over-night camping facilities and picnic areas. This development is known as the Lagoon Park Recreation Area.[15]

ARGUMENT

INTRODUCTION

This case, as it now stands before the Court, involves the use of public recreational facilities by such private organizations as churches, civic clubs and charitable and fraternal organizations. It also includes the use of public recreational facilities in common

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13. Report filed with District Court December 29, 1972, Report filed with District Court June 29, 1973.

14. Article appearing in *Montgomery Advertiser* on September 5, 1973.

15. Article appearing in *Montgomery Advertiser* on September 5, 1973.

with other members of the public by individual children or groups of students who may be enrolled in private segregated schools. The case here *does not* raise the question as to grants, support or aid to private segregated schools. The Court of Appeals and the District Court each held the use of public property by segregated private schools to be constitutionally impermissible. (App. 3A-10A and App. 17A-26A)[16] The petitioners obtained in the courts below all of the constitutional relief which they sought in the area of segregated private schools.

The posture of the case as it now stands involves two remaining issues:

1. Whether a municipality is constitutionally required to prohibit all private organizations, groups and clubs which have a discriminatory admissions policy from using public recreational facilities?

2. Whether a municipality is constitutionally required to prohibit students who are enrolled in private segregated schools (both black and white) from using public recreational facilities even in common with other members of the public?

The bulk of the brief of the petitioners is addressed to the issue of private segregated schools using public recreational facilities.[17] This issue has been concluded in this case favorably to the petitioners. The City is abiding by this mandate in all respects.

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16. *Gilmore v. City of Montgomery*, 337 F. Supp. 22. *Gilmore v. City of Montgomery*, 473 F. 2d 832.

17. Petitioners in brief dwell at length on the past practice of the City during the 1950's and 1960's and make much of the case

We do not believe that non-school private clubs or children who may be enrolled in segregated private schools should be governed by the same constitutional principles as are applicable to the private segregated schools themselves.[18]

This case in 1959 originally sought and obtained for the Negroes of Montgomery, Alabama equal and non-discriminatory access to all public recreational facilities. The original plaintiffs objected to "any distinction on account of race or color in extending and granting the right and privilege of admission" to public recreational facilities. It is without dispute in the case *sub judice* that Negroes in Montgomery, Alabama are, in fact, now afforded entirely equal rights as are afforded to all members of the public. The petitioners now urge this Court to make the very racial distinctions which they sought at the outset in 1959 to prohibit. The petitioners ask this Court to make distinctions in the availability of public recreational facilities on account of the racial admission policies of private clubs, groups and organizations. The pe-

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of Smith v. YMCA, 316 F. Supp. 899 (M. D. Ala. 1970) aff'd 462 F. 2d 634 (5th Cir. 1972). We will emphasize in this brief the *present* practice of the respondents and their continuing achievements in the area of desegregated and non-discriminatory public recreation. We note here that the case of *YMCA v. Smith*, supra, requires a completely desegregated and non-discriminatory program. The petitioners do not question these *present* desegregated and non-discriminating programs.

18. This distinction between the constitutional test and standards to be applied to private clubs as opposed to segregated private schools was recognized by the District Court (337 F. Supp. 22, 25; App. 24a) and by the Court of Appeals (473 F. 2d 838-839, App. 12a-15a)

titioners seek to prohibit groups and organizations from using recreational facilities because of their racial admissions policies. The petitioners also urge that individual children and groups of children be forbidden to use and enjoy public recreational facilities because of the racial nature of the enrollment of the school they may attend.

The Civil Rights Act of 1964[19] which barred discrimination in public accommodations, specifically exempts private clubs from the application thereof. The petitioners ask this Court, in a case which originally made recreational facilities open to all, to now close such facilities to the type of organizations specifically exempted from the 1964 congressional mandate.

It was not shown in either of the courts below that any of the petitioners were excluded in any way from any recreational facilities or activities in Montgomery, Alabama. To the contrary it is without dispute that all groups, individuals and clubs, regardless of their racial composition, are welcome in all such facilities. The petitioners have not shown the slightest deprivation of their rights. There is absolutely no showing of such grave abuse as could possibly justify the denial to others of access to public recreational facilities solely because of admissions policies.[20]

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19. 42 U. S. C. Section 2000 (a) (e).

20. See *Thomas v. Collins*, 323 U. S. 516, 530, 89 L. Ed 430, 440, 65 S. Ct. 315; *Sherbert v. Verner*, 374 U. S. 398, 10 L. Ed 2d 965, 83 S. Ct. 1790.

I

PRIVATE ORGANIZATIONS INCLUDING CHURCH, CIVIC, FRATERNAL AND CHARITABLE GROUPS, OTHER THAN SCHOOLS, ARE ENTITLED TO USE AND ENJOY PUBLIC RECREATIONAL FACILITIES WITHOUT REGARD TO THE RACIAL ADMISSIONS POLICIES OF SUCH PRIVATE ORGANIZATIONS.

A. THE FOURTEENTH AMENDMENT DOES NOT REQUIRE THE EXCLUSION OF PRIVATE SEGREGATED CLUBS FROM PUBLIC RECREATIONAL FACILITIES.

The petitioners seek to prohibit all private clubs, groups and organizations from using municipal recreational facilities unless the private club has a racially open admissions policy. Governmental restriction based on discriminatory admissions policies is sought against such purely private organizations as religious, political, social, charitable and fraternal groups. The District Court found to be unconstitutional and enjoined the practice of the City in allowing all such groups, regardless of race or racial admissions policies to use public recreational facilities. The Court of Appeals held this portion of the District Court order to be overbroad. Indeed, to restrict private organizations on the basis of their admissions policies from the same use of recreational facilities as that afforded to the rest of the public is to strike at the very heart of our democratic and pluralistic society. *Evans v. Newton*, 382 U. S. 296, 298-299, 86 S. Ct. 486, 488, 15 L. Ed 2d 373; *NAACP v. Button*, 371 U. S. 415, 444-445, 83 S. Ct. 328, 344, 9 L. Ed 2d 405.

As an imminent constitutional scholar has noted, Americans have always placed great emphasis on the right to associate with others in groups; and this right has assumed increasing importance in modern times wherein, simply in order to be heard above the increasing noise of the increasing multitudes, an individual frequently finds it advisable to join with others to voice mutual concerns and to pursue common goals[21]

During the last term, this Court in the case of *Healy v. James*, 408 U. S. 169, 33 L. Ed 2d 266, 92 S. Ct. 2338, upheld the right of a student association to be recognized by the university administration and to use campus facilities including a coffee shop. The Court held:

> "Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs. *While the freedom of association is not explicitly set out in the Amendment, it has long been held to be implicit in the freedoms of speech, assembly, and petition.* Baird

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21. Emerson, FREEDOM OF ASSOCIATION AND FREEDOM OF EXPRESSION, 74 Yale L J 1.

See: Schaeffer, Private Clubs: Freedom of Association Overlooked in Effort to Guarantee Equal Protection, (1964), 23 Syracuse Law Review p. 905, "The First Amendment of the United States Constitution has been interpreted by the Supreme Court as guaranteeing freedom of association, despite the absence of language to that effect" and Gunther, The Supreme Court, 1971 Term, 86 Harvard Law Review 1 at 75 N. 34 second paragraph citing United States v. Robel, 389 U. S. 258, 19 L. Ed 2d 508, 88 S. Ct. 419. See also NAACP v. Alabama, 357 U. S. 449, 2 L. Ed 2d 1488, 78 S. Ct. 1163; Bell v. Maryland, 378 U. S. 266, 12 L. Ed 2d 822, 84 S. Ct. 1814; Evans v. Newton, 382 U. S. 296, 15 L Ed 2d 373, 86 S. Ct. 486.

v. State Bar of Arizona, 401 U. S. 1, 6, 27 L Ed 2d 639, 646, 91 S Ct 702 (1971); NAACP v Button, 371 US 415, 430, 9 L Ed 2d 405, 416, 83 S Ct 328 (1963); Louisiana ex rel. Gremillion v NAACP, 366 US 293, 296, 6 L Ed 2d 301, 304, 81 S Ct. 1333 (1961); NAACP v Alabama ex rel. Patterson, 357 US 449, 2 L Ed 2d 1488, 78 S Ct 1163 (1958)"—33 L. Ed 2d at p. 279 [emphasis added]

". . . the College, acting here as the instrumentality of the State, *may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent.*" 33 L. Ed 2d at p. 283 [emphasis added]

It follows that the City of Montgomery should not be ordered to prohibit the use by purely private groups of public facilities because of their attitudes or racial policies.

In *Evans v. Newton,* supra, the Court through Mr. Justice Douglas specifically recognized:

". . . the right of the individual to pick his own associates so as to express his preferences and dislikes and to fashion his private life by joining such clubs and groups as he chooses." (15 L. Ed 2d at p. 377)

In the case of *Bell v. Maryland,* 378 U. S. 266, 12 L. Ed 2d 822, 84 S. Ct. 1814, Mr. Justice Goldberg in a concurring opinion wrote:

"Prejudice and bigotry in any form are regrettable, but *it is the constitutional right of every person to close his home or club to any person or to choose his social intimates and business partners solely on the*

basis of personal prejudices including race. These and other rights pertaining to privacy and private associations *are themselves constitutionally protected liberties.*" (12 L. Ed 2d at p. 848) [emphasis added]

In *United States v. Robel,* 389 U. S. 258, 19 L. Ed 2d 508, 88 S. Ct. 419, the Court reiterated that the right of association protected by the First Amendment is just as basic as the right to travel protected by the Fifth Amendment. (19 L. Ed 2d at p. 513)

In *Moose Lodge v. Irvis,* 407 U. S. 163, 92 S. Ct. 1965, 32 L. Ed 2d 627, the Court stated:

"The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the equal protection clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatsoever. Since state furnished services include such necessities of life as electricity, water, and police and fire protection, such a holding would utterly emasculate the distinction between private as distinguished from state conduct as set forth in the Civil Rights Cases [109 US 3, 3 S Ct 18, 27 L Ed 835 (1883)] and adhered to in subsequent decisions. Our holdings indicate that where the impetus for the discrimination is private, the State must have 'significantly involved itself with invidious discriminations, Reitman v. Mulkey, 387 US 369, 87 S Ct 1627, 1634, 18 L Ed 2d 830 (1967) in order for the discriminatory action to fall within the ambit of the constitutional prohibition." 407 U. S. at 173, 92 S. Ct. at 1971, 32 L. Ed 2d at 637.

As noted by the Court of Appeals this case does not involve any evasion of the City's responsibility to operate recreational facilities on a completely desegregated and non-discriminatory basis.[22] (App. 15a note 14)

It is well settled that private organizations such as the ones here involved would not be violating constitutional mandates by having a discriminatory admissions policy; *Moose Lodge v. Irvis Supra; Norwood v. Harrison;* ..... U S ....., 37 L Ed 2d 723, 93 S Ct. 2804

As noted hereinafter, Negroes are in no way excluded from the public recreational facilities in Montgomery. No substantial adverse effect was shown to have resulted to the petitioners from the City's completely open policy with regard to recreational facilities. The City therefore should not be required to prohibit the use of public facilities by groups who exercise a constitutional right of association.

The vague argument of petitioners with regard to emotional distress resulting to Negroes when they see segregated private groups using parks, museums and playgrounds was not presented in the trial court below. There is absolutely nothing in the record to support such an argument. In any event, the argument is illogical and without constitutional support. When Negroes either individually or with black, white or mixed groups use public facilities together and in common with the entire public, we fail to see any

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22. The respondents here are in strict compliance with the constitutional mandates set forth in Watson v. Memphis, 373 U. S. 526, 10 L. Ed 2d 529, 83 S. Ct. 1314.

basis for an inferiority argument.[23] People associate and will continue to associate and to choose their friends on the basis of individual preference. (*Bell v. Maryland*, supra) It would be impossible for one seeing a black group of individuals or a white group to even know whether the group was composed of club members. It, of course, would be impossible for one to know or to feel inferior about an admissions policy of a group he would have no reason to know would exist. More importantly, Negroes in Montgomery have the perfect right to attend any recreational facility in this community either individually or in groups. There is simply no basis for any emotional distress or feelings of inferiority. The logical conclusion from petitioners' argument would be to prohibit church, civic, political, charitable and social groups from availing themselves of our national park system, public beaches, public auditoriums, public football, baseball, basketball facilities and from all of the public recreational areas now available and being made available on a state and national basis.[24]

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23. It is appropriate to ask whether Negroes would have any different feelings from seeing a group of whites using a public facility than would whites when they see all black church, fraternal or other such private groups using a public facility.

24. See Vol. 58 Iowa Law Review 108 at p. 135:

"It could be argued at the outset that no right of association or privacy is compelling enough to suspend the termination of government involvement in private discrimination. However, such a bald assertion would require the government to discharge an employee who sends his children to segregated private schools or is a member of a segregated private club on the theory that the individual's government job enables him to pay the tuition or the dues which, in turn, furthers the discriminatory activity.

This certainly is not presently the law and we respectfully submit that the Framers of the Constitution never intended such to become the law.

B. THE PETITIONERS AND THE MEMBERS OF THEIR CLASS WERE NOT SHOWN TO HAVE BEEN EXCLUDED FROM ANY PUBLIC RECREATIONAL FACILITY OR TO HAVE BEEN DENIED EQUAL PROTECTION OF THE LAW.

It was expressly stipulated in the Court below that all public recreational facilities in Montgomery, Alabama are, in fact, open to all persons, groups and associations without regard to race. (App. 67) The District Court expressly found this to be true as did the Court of Appeals. In requiring the City to forbid private organizations with discriminatory admission policies the use of public recreational facilities, the District Court made no findings with regard to petitioners being adversely effected by the practice of allowing all non-school private groups the use of municipal facilities without regard to race. There was, in fact, nothing in the record that could warrant such a finding. The established and documented facts are to the contrary. Extensive new recreational developments are being completed, some of which are pursuant to

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It would also require the state to refrain from enforcing trespass laws against intruders upon private property who are excluded solely because of their race. It would further require that the government suspend all support to religious and political associations which discriminate in their membership. These and other examples indicate that such an absolute doctrine is unrealistic and undesirable."

the court agreement of 1970 and some including the new golf course, swimming pool areas and recreational facilities (such as swimming pools adjacent to housing projects) go far beyond the agreed plan for improvement.[25] As previously noted Negroes now have substantial representation on the respondent Parks and Recreation Board and throughout the staffing of the Recreation Department.

There was absolutely no showing by the petitioners that they were being excluded from any recreational facility or activity in Montgomery, Alabama. There was no showing by petitioners as to any purported effect of discrimination.

Mr. Justice Black in *Palmer v. Thompson*, 403 U. S. 217, 29 L Ed 2d 438, 91 S Ct 1940, in upholding the closing of swimming pools in Jackson, Mississippi, observed that ". . . a major purpose of [the Fourteenth Amendment] was to safeguard Negroes against *discriminatory state laws—state laws that fail to give Negroes protection equal to that afforded to white people.*" In *Palmer v. Thompson* the Court stated:

> "The question, however, is whether this closing of the pools is state action that denies 'the equal protection of the laws' to Negroes . . ." 29 L. Ed 2d at p. 442

The Court observed that the action by the City there involved:

> ". . . shows no state action affecting blacks differently from whites . . ." 29 L. Ed 2d at p. 445

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25. Reports filed with the District Court in December of 1972 and July of 1973. (G. W. Smiley example.)

and concluded:

> "Should *citizens of Jackson* or *any other city be able to establish* in Court that public, tax-supported swimming pools *are being denied* to one group *because of color and supplied to another*, they will be entitled to relief. But that is not the case here." 29 L. Ed. 2d at p. 446 [emphasis added]

In the case, *sub judice*, it is without dispute that all Negroes and all groups of Negroes may readily use any recreational area throughout the City of Montgomery.

In order to be entitled to constitutional relief against these respondents the petitioners must show that the City has denied to them the same protection as that provided to other citizens. The petitioners here are in the position of complaining because the City does, in fact, treat them equally and in a non-discriminatory manner.

This Court in *Moose Lodge v. Irvis*, 407 U. S. 163, 32 L. Ed 2d 627, 92 S. Ct. 1965, held:

> "In 1883 this Court in the Civil Rights Cases, 109 US 3, 27 L Ed 835, 3 S Ct 18, set forth the essential dichotomy between *discriminatory action by the State, which is prohibited by the Equal Protection Clause*, and private conduct, 'however discriminatory or wrongful,' *against which that clause 'erects no shield,'* Shelley v Kraemer, 334 US 1, 13, 92 L Ed 1161, 1180, 68 S Ct 836, 3 ALR2d 441 (1948). That dichotomy has been subsequently reaffirmed in Shelley v Kraemer, supra, and in Burton v Wilmington Parking Authority, 365 US 715, 6 L Ed 2d

45, 81 S Ct 856 (1961)." 32 L. Ed 2d at p. 637. [emphasis added]

This Court in *Moose Lodge v Irvis*, supra, held that the state licensing of the Harrisburg, Pennsylvania Moose Lodge did not significantly affect the right of minority groups to purchase liquor or to obtain club licenses for themselves. "There is no suggestion in this record that Pennsylvania Law, either as written or as applied, discriminates against minority groups either in their right to apply for club licenses themselves or in their right to purchase and be served liquor in places of public accommodation." (32 L. Ed 2d at p. 639)

In the instant case there is no suggestion in the record that Montgomery, Alabama discriminates against minority groups either in their right to apply for the use of municipal facilities or in their actual enjoyment of all facilities throughout the City. The minority groups here have all of the recreational facilities available to them on exactly the same basis as all other members of the public. No denial of equal protection has been factually alleged or shown.

In *Evans v. Abney*, 396 U. S. 435, 24 L. Ed 2d 634, 90 S. Ct. 628, the court established that in order for persons to obtain constitutional relief they must have been denied equal protection of the laws. The court in *Evans v. Abney*, supra, was writing to a similar situation as existed in *Palmer* wherein public recreational facilities were no longer to be available to any members of the public, white or black. The Georgia Supreme Court ruled that if the land passing through a trust under Senator Bacon's will could not be used

for public parks on a segregated basis, the trust failed and the land reverted to his heirs. The Court in finding no actionable discriminatory conduct on the part of the state, held:

> "Surely the Fourteenth Amendment is not violated where, as here, a state court operating in its judicial capacity fairly applies its normal principles of construction to determine the testator's true intent in establishing a charitable trust and then reaches a conclusion with regard to that intent *which, because of neutral and non-discriminatory state trust laws, effectively denies everyone, whites as well as Negroes, the benefits of the trust.*" (24 L. Ed 2d at p. 645)

> "The responsibility of this Court, however, is to enforce the Constitution and laws of the land as they are and not to legislate social policy on the basis of our personal inclinations."[26] (24 L Ed 2d at p. 645)

In *Palmer* and *Abney* it was held that the closing of recreational facilities to all, whites and blacks alike, was not constitutionally forbidden. In the case, *sub judice,* no facilities are being closed. To the contrary expanded and improved recreational areas are in fact being opened and hopefully will be open to all. Surely it should not be forbidden to open recreational fa-

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26. See Schaeffer, Private Clubs: Freedom of Association Overlooked In Effort To Guarantee Equal Protection", 23 Syracuse Law Review p. 905 (1972)—"Although arguably deplorable, perhaps the membership policies of private organizations such as the Moose Club should not be changed by the courts. That change may need to come from within the organization or from the legislature." 23 Syracuse Law Review at 917.

cilities and to build additional ones which are and will be open to all blacks and whites alike.

This case is distinguished from *Norwood v. Harrison,* ..... US ....., 37 L Ed 2d 723, 93 S. Ct. 2804 in that there state grants to private segregated schools were the sole issue. The court held in *Norwood v. Harrison,* supra that the *affirmative duty* to achieve a unitary school system could not be directly or indirectly interfered with by grants of text books to private segregated schools. Here, however, as noted by the District Court "this affirmative duty *does not extend* to cases involving private groups other than those affiliated with schools." (App. 25a)

The decision of the Court of Appeals below follows the principle of *Norwood v. Harrison,* supra, and is consistent with the holding of this Court in *Moose Lodge v. Irvis,* supra, which involved a non-school private fraternal organization. In *Norwood v. Harrison,* supra, the Court observed that purely private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment. (37 L. Ed 2d at 734)

The case *sub judice is* also distinguished from *Burton v. Wilmington Housing Authority,* 365 U. S. 715, 6 L. Ed 2d 45, 81 S. Ct. 856, wherein discriminatory state action was found to exist *by the exclusion of Negroes* from a publicly owned but privately leased restaurant facility. Here, *Negroes are not excluded* from any of the publicly owned recreational facilities. As held by the Court of Appeals below, private use of recreational facilities by all private clubs, on a nondiscriminatory basis and regardless of racial composi-

tion, cannot be reasonably construed to form the basis of invidious state discrimination. Additionally the Court of Appeals found that the periodic use of recreational facilities by private organizations did not evidence the same state nexus with such groups as was shown in *Burton*.

The Court noted in *Burton* that it was impermissible to exclude a Negro from the publicly owned and privately leased restaurant area when such minority member "at the same time fully *enjoys equal access* to nearby restaurants and wholly privately owned buildings."

The petitioners would have this Court extend the principle of *Burton v. Wilmington*, supra, to hold, in effect, that Eagle, the restaurant thereinvolved, would be constitutionally forbidden to serve private clubs, groups and organizations solely on the basis of the admissions policy of such groups.

C. WHEN THERE IS NO SIGNIFICANT EFFECT ON COUNTERVAILING RIGHTS OF EXCLUDED INDIVIDUALS, PRIVATE GROUPS CANNOT BE DENIED ACCESS TO PUBLIC RECREATIONAL FACILITIES SOLELY BECAUSE OF THEIR DISCRIMINATORY ADMISSIONS POLICIES.

It cannot be argued that this case involves the necessity for a balancing of constitutional rights—since petitioners here have not shown that they have been deprived of any rights whatsoever. In this regard the Court of Appeals held that the policy of the City in permitting all persons to use recreational facilities was not shown to have any significant effect on "counter-

vailing rights of excluded individuals." As previously noted, it is settled that private groups may constitutionally engage in discriminatory admissions policies.[27] It is also settled that all persons, groups and associations have the right to use and enjoy public recreational facilities on a non-discriminatory basis.[28]

The petitioners seek to have private groups with discriminatory admissions policies elect which of their constitutionally protected rights they wish to exercise, i.e., whether such groups shall use public recreational facilities or whether they shall maintain a racially discriminatory admissions policy. To require such a decision under the non-discriminatory facts of this case is not constitutionally warranted or justified.[29]

Petitioners argue that by allowing all private clubs, regardless of their admission policies, to use public recreational facilities the City unconstitutionally lends support to discrimination. In this regard the petitioners rely principally on the case of *Reitman v. Mulky*, 387 U. S. 369, 18 L Ed 2d 830, 87 S. Ct. 1627, which struck down a statute which the court found to affirmatively authorize and permit racial discrimination in the sale of homes. The petitioners also rely here on the case of *Norwood v. Harrison*, supra the

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27. *Bell v. Maryland*, 378 U S 266, 12 L Ed 2d 822, 84 S. Ct. 1814; *Evans v. Newton*, 382 U S 296, 86 S. Ct 486, 15 L Ed 2d 373; *NAACP v. Button*, 371 U S 415, 83 S. Ct. 328, 9 L Ed 2d 405.

28. *Watson v. Memphis* 373 U S 526, 83 S. Ct. 1314, 10 L Ed 2d 529; *City of Montgomery v. Gilmore*, 277 F 2d 364 (5th Cir. 1960)

29. This case would present different constitutional issues if for any reason public recreational facilities were available *only*

textbook grant case. We fail to see how the City here in permitting all groups to use recreational facilities, encourages, supports, favors or lends prestige to one group over another. The facilities are open to all groups on a non-discriminatory basis. Unlike the segregated private school cases, there is no affirmative constitutional duty on the part of governmental agencies to achieve integrated membership in civic clubs, churches or other private organizations. The City here, as distinguished from the State in *Reitman* has not taken affirmative action to further segregation but to the contrary has adopted the policy of treating all private groups alike.

Since the petitioners have not been discriminated against or deprived of any substantial rights we fail to see any constitutional right on their part to be balanced against the right of association and the right of private clubs and organizations to use public recreational facilities. It has been long recognized that the power of government to restrict and regulate often encompasses the power to prohibit absolutely. *Lottery* Case, 188 U. S. 321.[30]

This court has consistently held that the restriction of constitutionally protected rights must be based on "only the gravest abuses endangering paramount

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to the membership of private groups from which Negroes were excluded.

As to state imposed choices between constitutionally protected rights see *Sherbert v. Verner*, supra, 10 L. Ed 2d 965, 970-971.

30. UNCONSTITUTIONAL CONDITIONS, 73 Harvard Law Review, 1595, at page 1596.

interest." *Sherbert v. Verner*, 374 U. S. 398, 10 L. Ed 2d 965, 83 S. Ct. 1790; *Thomas v. Collins*, 323 U. S. 516, 530, 89 L. Ed 430, 440, 65 S. Ct. 315. In *Healy v. James*, supra, the court noted that unpopular and even abhorrent views or attitudes give no constitutional basis for the restriction of a constitutional right.

The petitioners seek to have these respondents ordered to deny private groups with racially discriminatory admissions policies the use of public recreational facilities regardless of the size or character of the purely private group.[31] The rule urged by the petitioners would lead to substantial infringement on the rights of persons to choose their associates.

II

THE CONSTITUTION DOES NOT PROHIBIT THE USE AND ENJOYMENT OF PUBLIC RECREATIONAL FACILITIES, IN COMMON WITH OTHER MEMBERS OF THE PUBLIC, BY INDIVIDUAL CHILDREN OR GROUPS OF STUDENTS WHO MAY BE ENROLLED IN SEGREGATED PRIVATE SCHOOLS.

The respondents in accord with the mandates of the District Court and the Court of Appeals do not permit private all-white schools to use any municipal recreational facilities. Such schools are not permitted to engage, to reserve or to use any municipal facility whatsoever. Football, softball and baseball facilities are not made available to such private schools.

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31. Petitioners make no distinction between religious, political, etc., groups or as to the intimacy of the relationships involved, purposes of the club, etc.

Such private schools or school-sponsored groups are not allowed to reserve, engage or to use banquet facilities, auditoriums for dances or any other type of public facility for school meetings or any type of school-sponsored function whatsoever.

The mandate of the Court of Appeals permits the respondents to allow individual children and groups of students who may be enrolled in an all-white school to use such public facilities only during such time as the facilities can be utilized in common with other children throughout the community.[32] For example, the respondents make no effort to restrict the attendance at the public library, museum or zoo to only those children who may attend a public desegregated school. All children throughout the community are allowed to attend municipally-sponsored cultural and civic events.

The Court of Appeals noted that allowing such communal, non-exclusive use, the City was not shown to have enabled a private school to duplicate public school operations at public expense.

No one would contend that the City should deny to private schools the same generalized services with regard to police and fire protection as is afforded to other members of the community. Although the Court in *Norwood v. Harrison* held that text books may not be granted to private, segregated schools at public expense, the Court observed:

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32. This portion of the order of the Court of Appeals is discussed in Vol. 44 Mississippi Law Journal 1017 at pp. 1020-1021.

"Free textbooks, like tuition grants directed to private school students, are a form of financial assistance inuring *to the benefit to the private schools themselves.*" (37 L. Ed 2d at 730.) [emphasis added]

The *private schools themselves* in Montgomery are not allowed the use of public recreational facilities or any other public facilities whatsoever.

The private schools as noted in *Norwood,* supra, could acquire textbooks from sources other than the state in that case. Thus to permit such schools to receive free textbooks from the state would be, in effect, to unnecessarily duplicate a school function at public expense.

In *Norwood,* supra, the Court held:

"Textbooks are a basic educational tool and, like tuition grants, they are provided *only in connection* with schools; they are to be distinguished *from generalized services government might provide to schools in common with others.* Moreover, the textbooks provided to private school students by the State in this case are a form of assistance readily available from sources entirely independent from the state—unlike, for example, 'such necessities of life as electricity, water and police and fire protection' *Moose Lodge No. 107 v. Irvis,* 403 U. S. 163, 173 (1972), *the state has neither an absolute nor operating monopoly on the procurement of school textbooks; anyone can purchase them on the open market.*" [emphasis added]

In the case of *Evans v. Newton*, supra, the Court held as follows in regard to parks:

> "A park, on the other hand, is more like a fire department or police department that traditionally serves the community. Mass recreation through the use of parks is plainly in the public domain." . . . 15 L. Ed 2d at p. 378

This municipality, regardless of what petitioners urge in brief, *does actually have an operating monopoly in the area of parks, museums, libraries and zoos.*

The petitioners urge that any assistance whatsoever to private schools with the possible exception of basic essentials, would be unconstitutional.[33] It would indeed be harsh and unconstitutionally unwarranted to deny individual children and groups of students who may attend private schools the right to use in common with other members of the public, a municipal museum or zoo. As stated by the Court of Appeals:

> "while the Constitution requires public authorities to abstain from assisting certain private schools, 'it does not require the state to be their adversary' " Everson v. Board of Education, 330 U. S. 1, 18; 67 S. Ct. 504, 513; 91 L. Ed 711 (1947)."

The petitioners would deprive children who may be enrolled in all-white private schools the opportunity

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33. The unrealistic and undesirable nature of such an absolute doctrine is noted by the commentator in 58 Iowa Law Review 108, at p. 135.

to participate along with other members of the public in all types of municipally sponsored programs. The argument of the petitioners would prohibit a group of private school children from being admitted, during school hours, to the audience in this Court. Would petitioners also restrict a group of students from an all-white private school from the Smithsonian Institute, the Library of Congress or from field trips to the Washington Monument or Lincoln Memorial? The "any aid whatsoever" argument of petitioners would lead to at least these far-reaching and unwarranted consequences.

The "exclusive use" prohibition is being effectively administered by the respondent officials in accord with the affirmative duty not to interfere in desegregated public education by assistance to private, segregated schools. We believe that the opinion of the Court of Appeals is consistent with the opinion of this Court as expressed in *Norwood v. Harrison*. The opinion of the Court of Appeals protects the right of black children not to have their desegregated education undermined and at the same time protects the rights of students who may be enrolled in an all-white school to have equal access to public facilities in common with other children of the community.

CONCLUSION

For the above and foregoing reasons we respectfully submit that the opinion of the Court of Appeals for the Fifth Circuit is due to be affirmed.

Respectfully submitted,

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Attorneys for Respondents

December, 1973

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 72-1517

GEORGIA THERESA GILMORE, GUSSIE CARLTON, SYLVIA JOHNSON, J. C. SMITH, MATTIE CARGILL, FRED HARRIS, GEORGE STEPHENS, ELIZABETH BROWN, on behalf of themselves and all others similarly situated,

Petitioners,

-v.-

CITY OF MONTGOMERY, ALABAMA, a Municipal Corporation; BOARD OF COMMISSIONERS OF THE CITY OF MONTGOMERY; JIM ROBINSON, CLIFF EVANS and J. B. RUCKER, as Members of the Board of Commissioners of the City of Montgomery; RECREATION BOARD OF THE CITY OF MONTGOMERY; RUFUS A. LEWIS, JEAN B. CAMPBELL, JAMES HALL, MUREAL R. CRUMP, CHARLES STAKELY, CHARLES W. ROSS and JAMES E. VICE, JR., as Members of the Recreation Board of the City of Montgomery; HENRY M. ANDREWS, as Superintendent of the Parks and Recreational Program for the City of Montgomery, Alabama,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

Certainly this litigation, begun in 1958, has a protracted history, but it is not ancient history. Although the respondent municipal officials contend that the petitioner's "dwell at length on the past practice of the City during the 1950's and 1960's,"[1] we should note that the motion for supplemental relief which gave rise to review in this Court was not even filed until the autumn of 1971,[2] little more than two years ago. Indeed, the City has in brief so forcefully applauded itself for its exemplary behavior that we should explore in more detail the record in this case.

1/ Respondents' Brief at 16 n. 17. Our count reveals only five paragraphs which arguably relate to pre-1970 facts, and the history of racial discrimination cases concerning the city, which we noted at page 19 n. 10, shows four new cases decided after 1970.

2/ Appendix at 10.

I.

On May 18, 1960, the District Court entered a formal order retaining jurisdiction of this case, as directed by the Court of Appeals, and continuing unchanged its prior judgment and injunction.3/ For over ten years following the decree's entry the plaintiffs filed no new requests with the District Court, preferring instead to give the decree time to work.4/

With the coming of a new decade the plaintiffs decided to review their situation in light of the city's changes in operation of recreational programs. In the original 1960 case Montgomery's blacks had succeeded in getting themselves

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3/ Appendix at 5.

4/ The sole docket entry after judgment and throughout the 1960's was an order closing the case without prejudice to reinstatement upon petition. Appendix at 5.

admitted to the city's parks. But after a decade they now discovered that the city had so restructured its recreational program that, though admitted to the parks, blacks were still effectively segregated from whites in all organized recreational activities.[5/] The technique for resegregation took an often-seen pattern: activities once carried on by the City had been wholly or partially transferred to private sponsorship, and whenever the City continued to manage a program, that program

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5/ The City, therefore, is quite truthful in asserting that "all Negroes . . . may readily use any recreational area throughout the City of Montgomery." Respondents' Brief at 27. But, like black school children admitted to white schools but kept in segregated classrooms, cf. Hobson v. Hansen, 269 F. Supp. 401 (D.C. D.C. 1967), app. dismissed, 393 U.S. 801 (1968), the petitioners want the right to participate fully as equals with whites.

became all-black while segregationist private groups conducted a parallel recreational program, on city property, for whites.[6/] Furthermore, the parks situated in black neighborhoods, those which blacks would be more likely to visit, had been given facilities grossly inferior to those provided in white neighborhoods.

The attorneys representing the plaintiffs-petitioners were therefore faced with three interrelated problems which called for three different legal approaches:

1) inequality of facilities -- a motion was filed in Gilmore requesting supplemental relief,[7/]

6/ The facts, discussed more fully below, come from the defendants' own depositions. These admissions are a part of the official court record in this case. The court may take judicial notice of its own records. See United States v. Pink, 315 U.S. 203, 216 (1942); National Fire Ins. Co. v. Thompson, 281 U.S. 331 (1930).

7/ Appendix at 6 (entry of 8/7/70).

2) complete turnover of recreational programs to private groups -- sue the offending YMCA in a separate action, allow it to continue to operate the programs but only on an integrated basis,[8]

3) partial takeover of recreational program by parallel white groups with resulting resegregation [academy football as well as other programs] -- file motion in Gilmore to ban use of public property to carry out the segregated groups' parallel recreational program.[9]

What the Court now sees, therefore, is not the isolated factual situation which the respondents present. The plan for improvement of black-area recreational facilities, which the city claimed it "voluntarily

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8/ Smith v. YMCA, 316 F. Supp. 899 (M.D. Ala. 1970), aff'd, 462 F. 2d 634 (5th Cir. 1972).

9/ This motion was the genesis of the decision now under review.

submitted,"[10] came after the petitioners had requested court intervention.[11] And what the City proclaims to be nothing more than an even-handed parceling out of its recreational facilities to any and all private groups is actually a heavy-handed system of segregating recreational programs on city property -- whites on the private teams, blacks on municipal teams or none at all.

10/ Respondents' Brief at 15.

11/ The Court had declared at pre-trial hearing that the plaintiffs "have made an extremely strong case of denial of equal protection." See Petitioner's [Principal] Brief at 85.

II.

This Court does not sit to decide abstract constitutional principles divorced from their factual settings. Cf. United States v. Johnson, 319 U.S. 302 (1943). That is why it is particularly important that the Court consider the entire recreational problem as it is revealed in both recent Gilmore motions and in Smith v. YMCA, supra,[12/] rather than focus on the narrow abstract principle of municipal provision of recreation facilities to private clubs. The evidence demonstrating the resegregation of the City's recreational program is staggeringly

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12/ The respondent municipality and officials were, of course, parties with the right to cross-examine witnesses in both Gilmore motions. Also, the City participated in the Smith v. YMCA case as amicus in support of the defendant YMCA.

massive.[13] It demonstrates again the deference which the Court of Appeals should have paid to the District Court with its intimate familiarity with this complex litigation and its interrelated facts.[14]

13/ The evidence disclosed in section A. below comes from the court findings in the YMCA case in which the City participated as amicus supporting the YMCA. See note 12 supra.

The remaining facts disclosed below come from the defendants' and their agents' depositions and the exhibits in this same Gilmore case as it was presented upon motion to require equalization of recreational facilities shortly before the present motion was filed. See page 5 ¶ 1, supra. This evidence was properly before the District Court to support its order herein because the Court may judicially note its records and because the defendants in their answer specifically raised the facts and settlement of the prior motion as a defense to the instant motion. Appendix at 46. That the records from the prior motion were properly before the Court is shown by the respondents' citation to their reports filed in accordance with the settlement of the prior motion. Respondents' Brief at 10 n. 6, 13 n. 10, 14 n. 11, 15 n. 13, and 26 n. 25.

14/ See Petitioners' [Principal] Brief at 19-23.

A. The Private Segregated YMCA-City of Montgomery Co-operative Recreational Efforts

Immediately upon taking office in 1959[15] Mayor Earl James appeared before the Montgomery Parks and Recreation Board and "requested that ... members of our staff and representatives of the YMCA meet in the mayor's office at the earliest possible date to review the agreement made with the YMCA in regard to a coordinated program."[16] A written agreement resulted from this meeting giving the segregated YMCA exclusive control of various recreational activities once operated by the City of Montgomery, yet the activities continued

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15/ Addendum pp.42a, 77a. Mayor James campaigned on a platform for an aggressive segregation effort in city facilities. Addendum 152a, (Plaintiffs' Exhibit 168,1970 Gilmore hearing).

16/ Addendum p. 137a, (Plaintiffs' Exhibit 28, 1970 Gilmore hearing).

to be conducted on City property with City aid.[17] The District Court, Judge Johnson, found that the "effect of this agreement has been the perpetuation of segregated recreational facilities and programs in the City of Montgomery".[18]

When changing conditions caused this YMCA - City agreement to be revised in 1965, Mayor James sent a letter, prepared for his signature by the General Secretary of the YMCA, to the Parks and Recreation staff and YMCA officials calling a meeting. The YMCA General Secretary wrote the Mayor, "I suggest that we do not include the Negro staff or Board Members".[19] Mayor James

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17/ Addendum pp. 5a-44a, 53a-69a, 125a-143a, 149a-151a, (James deposition pp. 47-85, Andrews deposition pp. 46-62, Plaintiffs' Exhibits 19, 22, 23, 24, 25, 27, 28, 29, 30, 43, 46, 1970 Gilmore hearing).

18/ Smith v. YMCA, 337 F. Supp. at 909.

19/ Addendum p. 131a, (Plaintiffs' Exhibit 24, 1970 Gilmore hearing).

testifed that he sent out the letter as instructed, that no Negroes were present, and that a revised agreement resulted.[20] The revised agreement[21] and its predecessor, the Mayor testified, had been "lived up to" by the City and the YMCA over "the past ten years".[22]

Under this revised agreement, dated November 8, 1965, the City granted the YMCA exclusive franchise of all city-wide swimming activities, control of elementary school football programs and numerous other recreational activities to be conducted on City property with City aid.[23] A city park,

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20/ Addendum pp. 21a-38a, (James deposition pp. 62-79).

21/ Addendum pp. 134a-136a, (Plaintiffs' Exhibit 27, 1970 Gilmore hearing).

22/ Addendum pp. 37a-38a, (James deposition pp. 78-79).

23/ Addendum pp. 134a-136a, (Exhibit 27, 1970 Gilmore hearing).

closed to avoid integration, was sold to the YMCA for the specified use as a "recreational facility" and if not so used, the property would revert to the City.[24] Mayor James became a member of the YMCA Board of Directors in 1964, and while a member, was responsible for reporting on YMCA-City co-ordinated recreational activities.[25] The extensive financial aid, use of City Recreation facilities, monopoly agreements, etc. granted the YMCA by the City of Montgomery is detailed by Judge Johnson in his opinion and order enjoining the segregated YMCA from refusing

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24/ Addendum pp. 125a-127a, 5a-8a, (Exhibit 19, 1970 Gilmore hearing), (James deposition pp. 46-49).

25/ Addendum pp. 7a-17a, 128a, (James desposition pp. 48-58), (Plaintiffs' Exhibit 22, 1970 Gilmore hearing).

to admit Negroes. He concluded:

> The YMCA has, therefore, been serving as a municipal, rather than private, agency in assisting the [Parks and Recreation] Board in providing recreational programs for the City of Montgomery.[26/]

Even in 1969 when the City of Montgomery planned swimming pools for its predominately Negro public housing projects, Mayor James contacted the YMCA to operate the facilities. The YMCA responded with a proposal whereby the Negro Cleveland Avenue Branch YMCA would operate the pools.[27/]

26/ Smith v. YMCA, 337 F. Supp. at 907.

27/ Addendum pp. 44a-49a, 138a-143a, (James deposition pp. 85-90, Plaintiffs' Exhibits 29, 30, 1970 Gilmore hearing).

B. The Segregated Dixie Youth Baseball - City of Montgomery Co-operative Youth Baseball Program

Prior to the City of Montgomery's closing its parks[28] in 1959, the City operated segregated Little League youth baseball programs using City-owned facilities. This white-only Little League was disbanded[29] and in 1962 a segregated private city-wide Dixie Youth baseball league was established[30] with a clause

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28/ "Parks", as used in this brief, refers to all City of Montgomery recreational facilities including city operated youth baseball diamonds, swimming pools, youth football fields, etc.

29/ Addendum pp. 94a, 55a-57a, (Brannon deposition p. 17), (Andrews deposition pp. 55-57).

30/ Addendum p. 103a, (Marshall deposition p. 14).

in its charter excluding Negroes.[31] This clause was dropped only recently "in order that our leagues, which did depend on municipal funds, could continue to operate".[32] Nevertheless, the boundaries of the several Dixie Youth leagues were not changed[33] and, according to the testimony of Montgomery's Athletic Supervisor Mr. Bozeman, "they have one or two black players in the league".[34] The City furnishes this segregated Dixie Youth league with ball fields, balls, bats, lights, mits and other aid.[35]

31/ Addendum p. 104a, (Marshall deposition p. 22).

32/ Addendum p. 104a, (Marshall deposition p. 22).

33/ Addendum pp. 100a-102a, (Marshall pp. 7-9).

34/ Addendum pp. 77a-78a, (Bozeman deposition pp. 20-21).

35/ Addendum pp. 74a-81a, 105a-110a, (Bozeman pp. 17-24, Marshall pp. 24-29).

Mr. Joe Marshall, head of the private Dixie Youth league, testified in the 1970 Gilmore case that a "happy relationship" existed between his organization and the City.[36/]

While this happy relationship prospered during the last eleven years, the City in 1963 established a Negro Little League under the direction of Mr. Brannon, a Negro recreation supervisor. The same age youth are served as in the white Dixie Youth program.[37/] Mr. Brannon testified that the City instructed him to establish the Little League "on a city-wide basis" but it doesn't in fact cover the greater Montgomery area because "it is a matter of

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36/ Addendum pp. 109a-110a (Marshall deposition pp. 28-29).

37/ Addendum pp. 82a-83a, 87a-93a, 120a-125a, (Bozeman deposition pp. 25-26, Brannon deposition pp. 5-11, Exhibits 5, 7, 8, 9, 10).

solicitation".[38]

C. Segregated Babe-Ruth Baseball Leagues

This same arrangement of dual private (for whites) and public (for Negroes) baseball leagues was also established, and still flourishes, for teenage youth. There is a private predominately white Babe-Ruth league and a public Negro Babe-Ruth league, both using City-provided parks, equipment, etc.[39] City Athletic Supervisor, Mr. Bozeman, designated the race of all the youth baseball leagues on plaintiff's (petitioner's) exhibit 40 at the 1970 Gilmore hearing.[40] It should be clear beyond peradventure that

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38/ Addendum p. 98a, (Brannon deposition p. 27).

39/ Addendum pp. 74a-77a, 144a-147a, (Bozeman deposition pp. 17-20, Plaintiffs' exhibits 32 and 39, 1970 Gilmore hearing).

40/ Addendum p. 148a, (Plaintiffs' Exhibit 40, 1970 Gilmore hearing).

up to and including the time of this hearing before the District Court, the City of Montgomery maintained virtual segregation of the races in its youth baseball programs by resorting to private segregated groups.

D. The Private Segregated Church and Civic Club - City of Montgomery Co-operative Recreation Programs

Another phase of the Montgomery recreational activities that has remained separate and segregated since the City vowed in 1958 that it would not "integrate its parks" is the church and civic club softball leagues.

The civic club softball leagues were assigned to the segregated YMCA to co-ordinate. The YMCA - City agreement states, "Civic Club Softball is under joint sponsorship. The Y.M.C.A. will provide administration and supervision, the Recreation

Department will provide the facilities".[41] These segregated civic clubs operated a full-scale competitive softball season using City facilities during the year the District Court held Gilmore hearings.

Separate segregated church softball leagues were established and existed at the time of the 1970 Gilmore hearing.[42] The City provides balls, equipment, fields, electricity, etc. at no charge and the church groups furnish the schedules. No white churches furnish teams to the City-employed Negro head of the Negro church softball league,[43] and only white church

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41/ Addendum p. 136a (Plaintiffs' Exhibit 27, page 3, 1970 Gilmore hearing).

42/ Addendum pp. 83a-84a, (Bozeman deposition pp 26-27).

43/ Addendum pp. 96a-97a, (Brannon pp. 19-20). The City does not passively sit while teams use the park fields, but rather actively participates in scheduling games for the all-white leagues.

teams play each other on City fields.[44/]

The pattern and practice of the City of Montgomery's using private groups, clubs, and churches to avoid integrating personal-contact sports of its recreation programs was established fully in the record that was before the District Court and is now before this Court.[45/] It is these group-type activities the District Court sought to enjoin and not individual participation by a citizen who might be a member

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44/ Addendum p. 84a, (Bozeman deposition p. 27).

45/ The timing of the switch-over from city leagues to the combination city leagues and private-leagues-on-city-property reinforces the District Court's conclusion. Not only is the effect to resegregate the park programs but it comes at a time when the city was under its original 1960 Gilmore mandate to end discrimination in its parks. Cf. Wright v. Council of City of Emporia, 407 U.S. 451, 465-66, (1972).

of one of these segregated groups and who might walk alone through a city park.46/

46/ The same considerations which we urged in our principal brief for distinguishing individual from school activity apply with equal vigor to clubs.

If the Court should find merit in the exclusive-use rationale as it applies to private schools, the doctrine would not save the City on its cooperative venture with private clubs. The use is exclusive, like football fields' use, to the extent that use by others is foreclosed. See Addendum p. 84aa ("Now, if there is a scheduled game already going on, I say 'No, it is filled tonight'"., Bozeman deposition p. 55); and Addendum pp. 116a-117a ("A field can accommodate so many teams.", McKeen deposition pp. 19-20).

III.

The previous sections of this reply brief have focused on the issue of the inclusion of private clubs in the District Court's relief decree. The other issue on review here, the Fifth Circuit's "exclusive use" test as applied to aid to segregationist academies, also deserves some short attention in reply.

The respondents argue in favor of the Fifth Circuit's position by raising the spectre of wholesale exclusion of all private school groups from public facilities and functions throughout the nation.47/

47/ The argument of the petitioners would prohibit a group of private school children from being admitted, during school hours, to the audience in this Court. Would petitioners also restrict a group of students from an all-white private school from the Smithsonian Institute, the Library of Congress or from field trips to the Washington Monument or Lincoln Memorial?
Respondent's Brief at 38.

That is quite clearly a bogus issue and a contrivance. The petitioners and the District Court strictly limit their position to cover only organized school activities dealing with recreational programs, and the only situation before the Court is that of recreation. The District Court carefully found that city provision of recreational facilities conferred benefits on the segregationist academies, and recreation is certainly a normal part of most schools' regular program of learning and instruction which they may provide on their own grounds. Whether field trips to public monuments or museums involve similar aid to private institutions is problematical, but in any event such situations must survive or fall on its own merits if litigated.

Another, and closing, observation about the exclusive use test is also

necessary. The test is an apparent attempt to identify, roughly, those activities which are not aid to segregation in the sense that the school groups could or would have participated in such activities even had they not been racially exclusive. Also there seems to be the feeling that any non-exclusive use, using two tennis courts or swings when ten are available, really does not harm blacks because there are still other courts or swings for blacks to use.

These feelings do not justify the "exclusive use" test and wholly miss the point of the evil of state aid to segregated schools. Even segregated schools' use of football fields, which the Fifth Circuit disapproved, is not an exclusive use in the sense that other dates are available for use. Furthermore, no blacks were shown to desire to use football fields only to be turned away because

white schools were using the fields. The evil is the attractiveness which provision of recreational facilities gives to the white-flight academy and the economy which it confers on the school's operating and capital budgets.

The Fifth Circuit's test really asks us to participate in a statistical guessing game as to the possibility that any particular use is exclusive. Use of one football field is exclusive says the Court of Appeals; use of one swing set when ten are available is presumably non-exclusive because the private school pupil participates "in common" with all park visitors and no one is left without a swing. Use of one tennis court out of ten is presumably non-exclusive; what about use of a football field when three fields are available? The guess as to the percentage of the use's support inuring to the school

and the percentage inuring to the pupil individually is exactly the kind of statistical guesswork ruled out in Norwood v. Harrison, 37 L.Ed. 2d 723, 732 (1973), quoting Poindexter v. Louisiana Financial Assistance Commission, 275 F.Supp. 833, 854 (E.D. La. 1967).

The District Court's decree adequately protects individual use of public recreational facilities by focusing its prohibitions only on school group activities. The petitioners' principal brief takes the same position. Petitioners' Brief at 23-32. No private rights of association are at issue, for there is no private right to participate in the public largess or to receive municipal aid to accomplish an unconstitutional result. Norwood v. Harrison, 37 L.Ed. 2d 723 (1973).

CONCLUSION

The City of Montgomery continues to run its recreational facilities and progra in a manner which effectively maintains segregation of the races -- private club and church teams operate all-white progra on city property with city cooperation while the city also maintains parallel municipal programs for blacks. Contrary to the respondents' assertion[48/] that blacks, having gotten themselves admitted to city parks, now want to exclude certai white groups, that is not the petitioners' goal. We seek what we sought in 1958 -- an end to segregation in whatever form and by whatever evasive schemes.[49/]

48/ Respondents' Brief at 17.

49/ Cf. note 45 supra.

Respectfully submitted,

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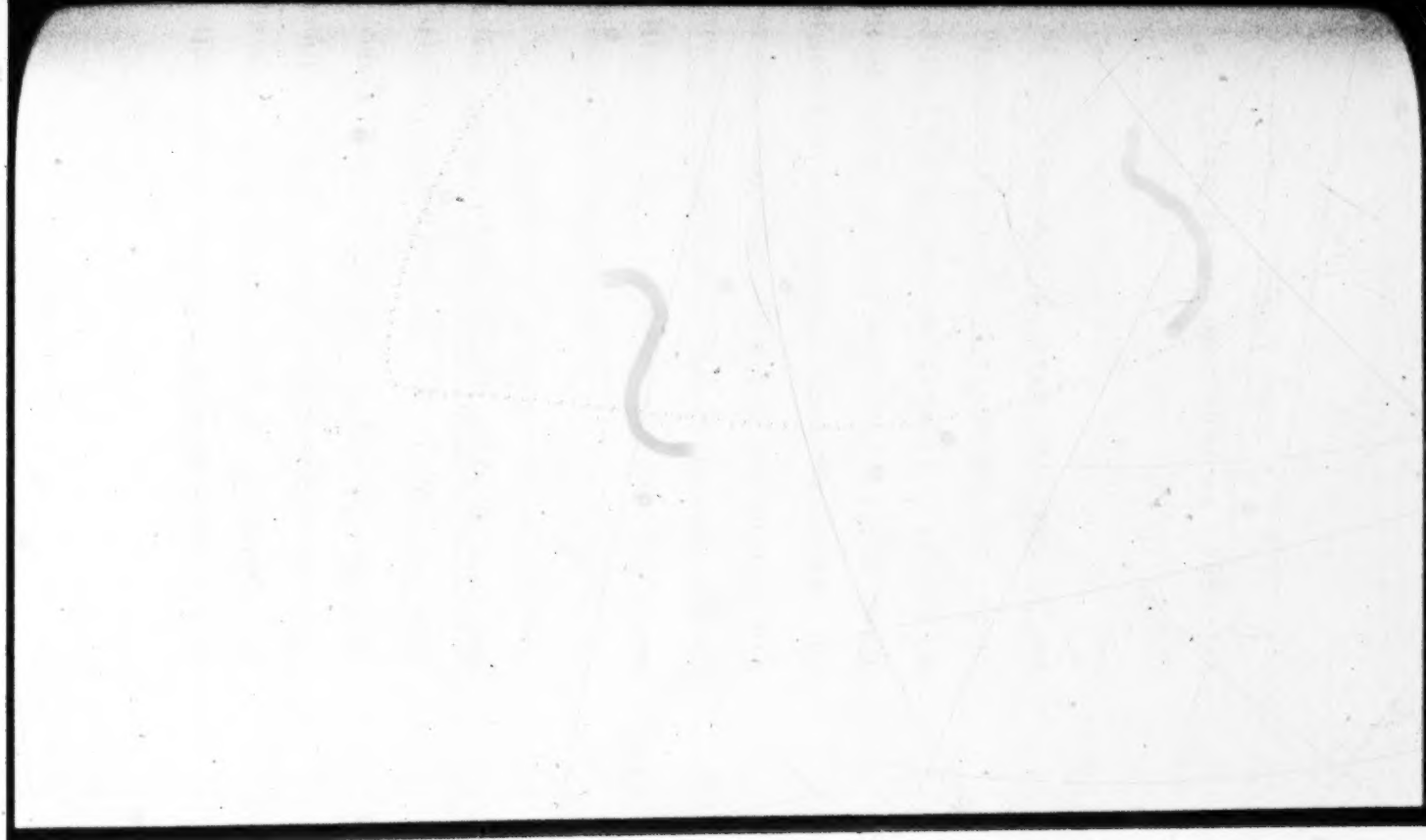

ADDENDUM

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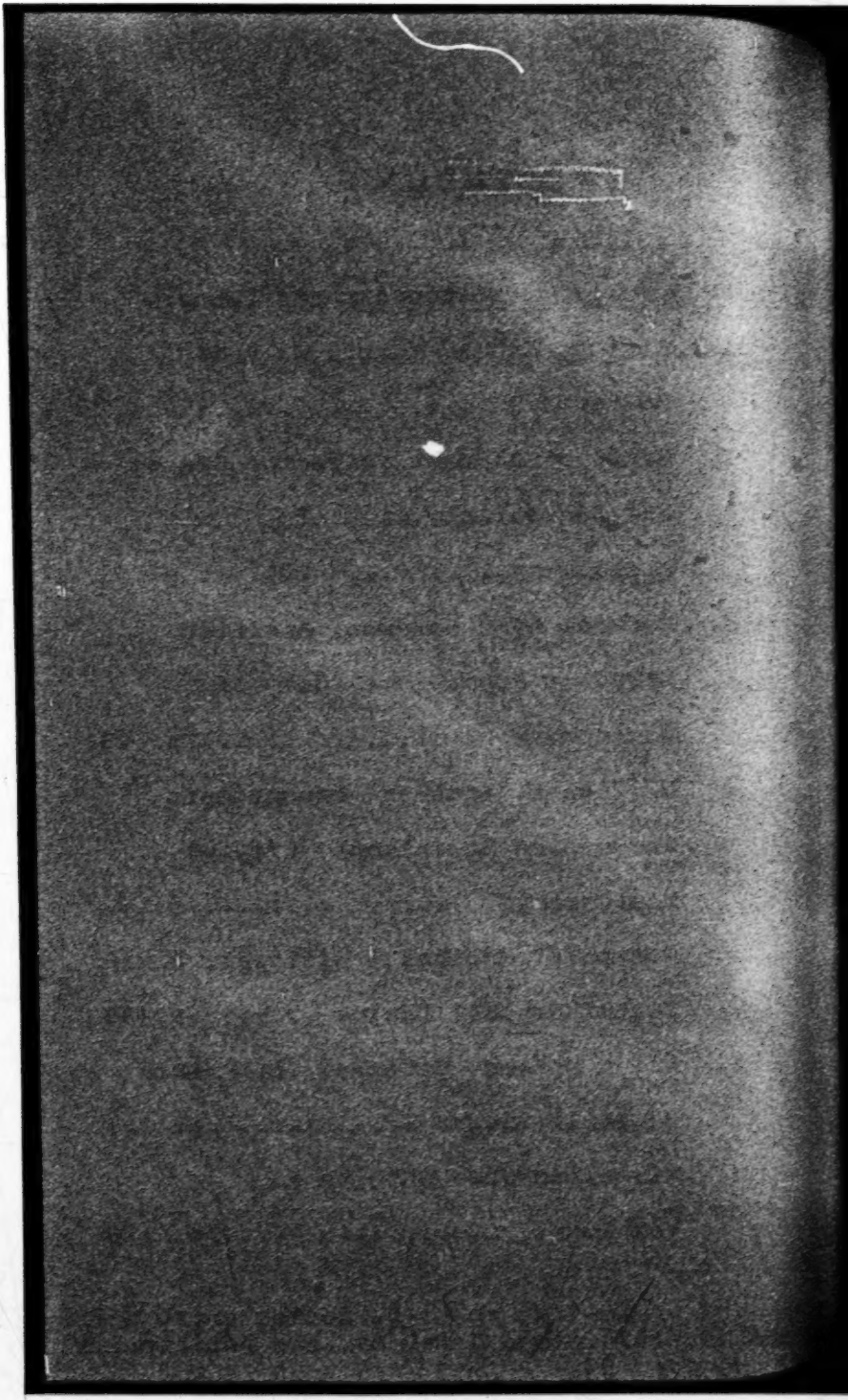
1a/ Appendix, pp. 7-8, docket entry October 9 and 29, 1970. See Brief for the Petitioners, Addendum, p. 84.



IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF ALABAMA

NORTHERN DIVISION

GEORGIA THERESA GILMORE,
et al,

Plaintiffs

vs.

CITY OF MONTGOMERY, ALABAMA,
et al,

Defendants

CIVIL ACTION

NO. 1490-N

DEPOSITION OF MAYOR EARL D. JAMES,

taken pursuant to notice and subpoena duces tecum on behalf of the Plaintiffs, in Room 207, United States Post Office and Court House Building, Montgomery, Alabama, before Christine Wilcox, Reporter and Notary Public for the State of Alabama at Large, on Thursday, September 17, 1970, commencing at 9:45 P.M.

APPEARANCES

MORRIS S. DEES, JR., Esq., and JOSEPH J. LEVIN, JR., Esq., Levin and Dees, 210 Washington Building, Montgomery, Alabama; and

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352 Dexter Avenue, Montgomery, Alabama, Attorneys for the Plaintiffs.

JOSEPH D. PHELPS, Esq., Hill, Robison, Belser and Phelps, 36 South Perry Street, Montgomery, Alabama; and

WALTER J. KNABE, Esq., Capell, Howard, Knabe and Cobbs, 57 Adams Avenue, Montgomery, Alabama; and

DRAYTON N. HAMILTON, Esq., Hinson and Hamilton, 26 South Perry Street, Montgomery, Alabama, Attorneys for the Defendants.

STIPULATION

It is stipulated and agreed by and between counsel representing the parties that the deposition of MAYOR EARL D. JAMES may be taken before Christine Wilcox, Reporter and Notary Public for the State of Alabama at Large, without the formality of a commission; and all formality with respect to other procedural requirements is waived; that objections to questions, other than objections as to the form of the question, need not be made at this time, but may be offered in evidence or used for any other purpose by either party, as provided by the Federal Rules of Civil Procedure.

It is further stipulated and agreed that the signature of the witness to this deposition is hereby waived by all

parties and witness.

MR. PHELPS: Under the Federal Rules of Civil Procedure, you can read this and sign it, before it is filed, or you can waive that. By reading it and signing it, you are just being sure that she got it all down right. We are going to read it and be sure it is all correct, so I can advise you, if you would, to waive signature.

MAYOR JAMES: I will waive.

MAYOR EARL D. JAMES, of lawful age, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DEES:

Q Would you state your name for the record, please?

A Mayor Earl D. James.

Q Mayor James, you are Mayor of the City of Montgomery?

A That is correct.

Q And for the record, you are white?

A That is correct.

Q The record can't see. Now, Mayor James, how long have you held this position?

A Mr. Andrews would have to answer that for you.

Q You don't have any knowledge of it?

A No, I do not.

Q All right. Mr. Mayor, I believe you ran for office in 1958, you said?

A I took office in '59.

Q In '59; but you ran in 1958?

A No, I would have been running in '59; I believe this is correct.

MR. HAMILTON: You run in the Spring, and take office in October.

MR. DEES: All right; all right.

MR. HAMILTON: Whatever year that was.

A It was '59.

Q All right, '59. Well, then, you were a citizen of Montgomery during 1958, then, were you not?

A Since 1922.

Q '22. And you were very aware of what was going on in politics and City government, and things of that nature?

A In 1958?

Q Yes, sir.

A In 1958, I was operating Earl James Cleaners, and trying to pay it out of debt.

deeded to the YMCA?

A This is correct.

Q I show you two documents --

MR. DEES: Let's mark them "19" and "20".

(At this time, the Reporter marks documents, "Plfs' 19" and "Plfs' 20"; said exhibits are attached to the back of this deposition and made a part hereof.)

Q Now, Mayor, would you identify, if you would, Plaintiffs' Exhibit No. 19?

. . . Witness examines document . . .

Q I don't really, you know, care that you have to explain anything in it, but just what that Resolution is, is mainly what I want to know.

A This is a Resolution, whereby the City of Montgomery sold to the YMCA this piece of property that had been closed for the YMCA, at an appraised price, I think, of eighteen thousand dollars.

Q Now, that -- excuse me, I didn't mean to interrupt you.

A I said, the best I remember, eighteen thousand dollars, which was the appraised price on it.

Q Now, look at Exhibit No. 20.

. . . Witness examines document . . .

A This is a document relating to the same, which states that if they hadn't constructed the building in so many years, that the City had the right to retain the property.

Q Now, let's identify this piece of property. I believe this is the Perry Street --

A (Interrupting) Perry Street.

Q (Continuing) -- park, closed by order of the City Commission, is that correct, sir?

A This is one I am assuming that was closed.

Q All right. I think the record would show that. Now -- and this Resolution -- which you were on the City Commission when it was passed, is that right?

A That is correct.

Q Was dated -- this doesn't carry a date. It says, "Published in the Alabama Journal, February 18, 1961," and this particular one has no signature on it, that I have here, Mr. Hamilton. I assume this particular one, this Resolution was signed by you, ultimately. There is no other date, other than it says, "1961".

A Or else it had been certified by the City Clerk, one.

Q All right.

MR. HAMILTON: Just an oversight. That is the certification of the Clerk. This is an official record.

MR. DEES: Official record as of 1961.

Q (By Mr. Dees) All right, now. You were in office then; are you familiar with the clause in this agreement that states if the YMCA -- that first of all, that says that this property, after it is sold to the YMCA shall be devoted to use of the Young Men's Christian Association in construction and operation of athletic, health and recreational and religious facilities; are you familiar with that clause in it?

A That is correct.

Q What reason did the City, that you know, or what reason did you have for insisting that that clause be put in this agreement?

A This is the normal operation of the YMCA.

Q Did the YMCA, in fact, build the structure there, subsequant to their purchase of the property?

A I am sure they did.

Q Well, I believe you go to Board meetings there, or have gone to Board meetings there; that is the Central "Y", isn't it?

A I used to be on the Board of Directors.

Q All right. And you attended them there at Central "Y"?

A Yes.

Q And that is the location of this piece of property?

A That is correct; yes.

Q All right.

A I thought you had reference, did they build it before the time limit of three years was over.

Q Now, had they built something other than a recreational facility there, I assume the City could have taken the property back, couldn't it?

A That would have to be for the legal interpretation of the lawyers, in regards to this.

Q Was it your layman's understanding that that was the intent of this whole thing?

A That is correct.

Q All right. Now, Mayor, I believe you were on the Board of Directors of the YMCA from 1964 to June of 1967, were you not?

A (Nods head affirmatively) I resigned because I didn't have time to attend the meetings.

Q All right. Now, during this period of time, you were familiar with -- while you were on the Board, and the

meetings you did attend, in your common knowledge of the YMCA being an integral part of Montgomery, you are familiar with the fact that it had four branches in Montgomery? It had -- I will name them for you -- the Cleveland Branch --

A (Interrupting) I don't recall, at that time, whether there were four or not.

Q From '64 to '67, during this period of time.

A (No response)

Q Now, we can establish that --

A (Interrupting) Yes.

Q (Continuing) -- with another witness. But you are aware of the fact that there was a Cleveland Branch of the YMCA --

A (Interrupting) Yes.

Q (Continuing) -- and during the time that you were on the Board of Directors, that was a predominantly black branch?

A That is true.

Q And that there was a Central and a South and an East Branch, and that they were predominantly white branches?

A I don't even recall whether there was a South or Central at that time.

Q From '64 to '67, when you were on the Board?

A Yes.

Q You don't even remember that you went up there to Board meetings --

A (Interrupting) I went to the Board meetings at the Central.

Q That is right. When you were on the Board, the Central Branch existed?

A That is correct.

Q All right. I am talking about the time -- not the time of the property deal, I am talking about the time you were on the Board, '64 to 1967, there was a Central Branch?

A That is true.

Q And an East and a South Branch?

A The East you refer to is the one out in the Capitol Heights area?

Q That is right.

A Yes, this is true.

Q That is right. All right, now. And these three branches, East, South and Central, were predominantly white branches?

A This is true.

Q All right. Now, you are also familiar with the fact that the YMCA, at its various branches, operated

swimming pools?

A I know they had one at Cleveland, and -- well, I knew they had one at all three. I never even did know whether there was one at the Central "Y", if you want to know the truth.

Q But you have found out that there is one there, have you not, sir?

A Yes.

Q And it has been there since it has been built, hasn't it?

A Apparently it has.

Q Yes, sir; all right. And out in your neighborhood, where you live in Capitol Heights, there is a YMCA branch, and that is the East Branch, and it has a swimming pool there, with it?

A That is correct.

Q And then, there is, in fact, a Southeast Branch by Dunnelly School, which is mainly a swimming pool; that is all it is, isn't it?

A That is correct.

Q All right, now. Now, were you familiar with the fact that the time that you were on this Board of the YMCA, '64 to '67, that the question of a compliance form came up

with the United Appeal, in terms of money collected from several installations, and that the YMCA, the Central Board, refused to sign this compliance form for racial equality?

A I wasn't familiar with it.

Q You never heard about this compliance form?

A Not at the time I was on the Board.

Q Never heard about it?

A It could have been.

Q Are you familiar with the fact that the Central Board has refused to sign, up until 1969, the racial compliance form of the United Appeal, that they operate an integrated facility; you are familiar with that fact, aren't you?

A I am not familiar with that fact.

Q Never heard about it, before?

A I am not familiar with that fact.

Q And at the time you were on the Board in 1964 to 1967, did you ever learn, directly or indirectly, from anybody, that the YMCA of Montgomery refused to make its contribution to the National YMCA because the National YMCA required a racially integrated program; are you familiar with that fact?

A It wasn't discussed at any Board meetings that I can recall, that I went to, Mr. Dees.

Q Well, did you -- well, put it this way, Mr. Mayor,

the Board meetings that you went to, did the YMCA talk about, let's say, building a Negro camp, for example; let's just say they already have a white camp, and they want to build a Negro camp?

A The majority of times that I went to Board meetings, they were discussing some ways to raise money.

Q But you did go to the Board --

A (Interrupting) Yes, I went; not too many.

MR. PHELPS: Off the record. We are going to object to these questions about the YMCA. I think that is getting into another lawsuit that has already been litigated. We don't object to your asking the Mayor about his functions as far as the City of Montgomery is concerned, but it is unduly lengthening this deposition, going into another lawsuit.

MR. DEES: Well, I state for the record, the Court has found an integral relationship between the City and the YMCA. And we note your objection, and I do want to ask some questions, because --

MR. PHELPS: (Interrupting) I didn't instruct him not to answer the questions, but it looks like

to me we are unduly lengthening this deposition, going into irrelevant matters.

MR. DEES: Well, it may be irrelevant to you, but unfortunately, it was borne by the City and the "Y", and we want to go into it.

Q (By Mr. Dees) Now, Mr. Mayor -- excuse me just a minute.

(At this time, the Reporter marks document, "Plfs' Ex 21"; said exhibit is attached to the back of this deposition and made a part hereof.)

Q Mr. Mayor, I show you a document, here, that purports to be the Minutes of the Board of Directors of the YMCA, January -- would you read the date, up there, on it?

A (Reading) "January 18, 1965."

Q And that is Plaintiffs' Exhibit 21. Now, is your name listed there?

A My name is listed.

Q Is listed as being in attendance there?

A (Reading) "The meeting was called to order by the President, Mr. Carl Dear, and the opening prayer was given by Dr. McDavid. The following were present" -- and my name is

there.

Q All right, now. Let me -- it states on this document that it is the Minutes of the Board of Directors of the City-wide YMCA. All right, now, would you read -- I believe this is the order of business that happened, and would you read item number six?

A (Reading) "Mr. Thompson advised that Dr. Parker had been asked to give study to the possibility of a Negro camp site. Suggested locations include the Negro area designated by the Alabama Power Company on Lake Martin; Waugh Community; and Madison Park.

"The Mayor inquired as to the potential interest of the YMCA for a site under the Urban Renewal program in West Montgomery. No action was taken."

Q All right. And now, read the next item.

A (Reading) "Items VII, VII and IX on the Building Study Report were presented to the Board without action taken."

Q No, I am talking about right here (indicates).

A I just said that.

Q So, in other words, you followed Mr. Thompson and inquired of the interest of the YMCA?

A That is right.

Q I see. Now, what was your reason for presenting,

requesting or -- there at the YMCA Board meeting, to see if they were interested in a recreational facility in West Montgomery?

A Mr. Dees, I don't recall, right at the present time, unless there was a possibility of some Urban Renewal that was going to be in that particular area.

Q Now, where -- what is West Montgomery, is that out around Washington Park?

A That is in the Washington Park area.

Q A predominantly black area?

A The Washington Park area, where the Western Hills Urban Renewal site is taking place -- it could have been.

MR. DEES: Mark this, right here.

(At this time, the Reporter marks document, "Plfs' Ex 22"; said exhibit is attached to the back of this deposition and made a part hereof.)

Q Mr. Mayor, have you -- when you were on the Board of Directors at the YMCA, was one of your responsibilities giving the City Recreation Report?

A I don't recall, Mr. Dees.

Q Well, let me show you Plaintiffs' Exhibit No. 22,

and read up at the top, what this is, what this says.

A (Reading) "Roll Call and Minutes. Earle Kitchon accepted our invitation to Board membership, but already had a commitment for today. Report on -- "

Q (Interrupting) That is the YMCA Board. Let me interrupt you --

A (Interrupting) "Board of Directors", it says. It doesn't say what the Board was.

Q All right. Just read on.

A (Reading) "Joel is out with an infected foot, following the removal of a toenail. Number one, Financial Report, Charles Kohn; Building Fund Collections, Gus Dozier; United Appeal Report and Request, Frank McGough; City Recreation Report, Mayor Earl James -- "

Q (Interrupting) Stop right there. All right, now, do you remember giving this report to these gentlemen, the City Recreation Report?

A I am sure if it is on there, I did.

Q And what would be the nature of your report?

A I would report on the activities of the Recreation Department, through information that I had received from Mr. Andrews.

Q In fact, Mayor James, you took the position, did you

not, on the Board, of emphasizing and encouraging coordinated efforts between the YMCA and the City of Montgomery?

A Absolutely.

Q So, this --

MR. DEES: Let's mark this document, right here, now, as Plaintiffs' Exhibit 23.

(At this time, the Reporter marks document, "Plfs' 23"; said exhibit is attached to the back of this deposition and made a part hereof.)

Q I will show you Plaintiffs' Exhibit 23, which states at the top it is the Minutes of the Board of Directors of the YMCA, March 2, 1966, and are you in attendance at that meeting?

. . . Witness examines document . . .

A It shows here that I was.

Q All right. Now, let's turn to Page 2, here, and read this into the record, right here, this sentance (indicates).

A (Reading) "A discussion of the City and the YMCA and the possibility of a combined effort in this area."

Q But your name is in there; read your name.

A Yes. (Reading) "In which Mr. James emphasized the value of the coordinated efforts of the City and the YMCA, and the possibility of a combined effort in this area."

Q So, then, you actively encouraged, while you were on the Board, the YMCA having combined efforts in cooperation with the City of Montgomery?

A Not only the YMCA -- the Boys' Clubs, and all the others.

Q Were you on the Board of Directors of the Boys' Club?

A I was not.

Q Did you enter into any kind of a written agreement with the Boys' Club, which sets out and specifies all the combined activities?

A In the coordinated program for the overall, the Boys' Club was taken into consideration.

Q But that coordinated program you are talking about was the one that was negotiated between the YMCA and the City of Montgomery, was it not?

A Yes, but the best I remember, the Boys' Club was included in it, as to what activities they would be responsible for, and what activities the YMCA would be responsible for, and --

Q (Interrupting) Well, I see. Mayor, let's bear with me just a minute, here. I show you this document, right here, and ask you if you recognize this document; has it been

called to your attention -- and I obtained this from Mr. Andrews on his YMCA deposition.

. . . Witness examines document . . .

A This is correct.

MR. DEES: Let's mark this document, here, as Plaintiffs' Exhibit No. 24.

(At this time, the Reporter marks document, "Plfs' Ex 24"; said exhibit is attached to the back of this deposition and made a part hereof.)

Q Now, Mr. Mayor, would you identify -- tell us what that is?

. . . Witness examines document . . .

A There were some disturbances going on between the YMCA and the City Recreation Department in regards to duplication of efforts pertaining to the children that we were trying to reach in our various recreational programs. As best I recall, at that particular time, the Recreation Department and the YMCA, both, were dealing in the Pee-Wee football groups, and ones of that nature in the elementary schools.

It was causing a lot of confusion in the minds of

the children. They would be playing on one team, and then, the YMCA would come along, and vice-versa the City, and then, they would jump over to the other team.

And so, in order to coordinate the whole program, we had a meeting to resolve just exactly as to what the responibility would be to the YMCA, and the responsibility to the Recreation Department.

Q Now, this letter, I believe, right here, says, "Rough draft," but you actually signed it and sent it?

A This is true.

Q And that is sent to the people designated there at the top?

A That was sent to the ones at the YMCA that Mr. Chandler advised me to send to.

Q And Mr. Chandler, in fact, even wrote this letter for you to write, didn't he?

A That is true.

Q All right. And this second sheet, he also sent that along with the letter, which you didn't send out, but he also sent this sheet along with it, didn't he, telling you who you ought to have on this committee?

A Now, whether he sent this to me or not, Mr. Morris Dees, I don't know.

Q Well, Mr. Andrews furnished it to me. I --

A (Interrupting) Now, this has been brought to my attention since that time, but I do not recall of ever receiving any information of this nature. This did not go out on my letter.

Q I realize that. Your letter is the first page of this document?

A Yes.

Q And I got this from Mr. Andrews, these two pages stapled together.

A But my letter did not include that. My letter included simply that (indicates), and I sent them to the ones that Mr. Chandler suggested I mail them to.

Q And Mr. Chandler, the people that he suggested were the people that are listed on this second sheet?

A This is correct; this is correct.

Q So, you followed his instructions, then?

A This is correct, because the YMCA was involved in it, and I felt like he should names the ones from the YMCA to attend the meeting.

Q All right. So, in other words, Mr. Chandler furnished you with a list of individuals that would attend this meeting that ultimately resulted in the revised cooperative

City-YMCA agreement?

A That is true.

Q And you followed the instructions that Mr. Chandler sent?

A That is true.

Q And you read, down there, where he said, "I suggest that we do not include the Negro staff members"?

A As I stated before, I do not recall receiving a memo along this particular line, where you make mention about not sending it.

Q But you followed all the instructions on this memo, at least, above this line that says, "No Negro staff members," did you?

A I sent the letters to the ones he said for me to deliver letters to.

Q All right. And you did not send any letters, to your knowledge, to the black YMCA leader, and any other black people?

A I sent the letter only to those that he told me to send them to.

Q And they were all white?

A Which represented his people.

Q And they were all white?

A As to whether or not they all were, I don't recall.

Q Well, you subsequently attended this meeting, when these people got together?

A The best I recall, I did, the first meeting.

Q Well, were there any black people there?

A I don't think there was.

Q All right; that is fine. And those that came, came at your request, because of your letter?

A That is right. And I am sure the YMCA followed up on it, too.

Q Now, you were familiar, Mr. Mayor, that in 1958, are you not, actually put together in 1959, that there had been a YMCA-City cooperation agreement, in writing?

A In '58?

Q No, in '59. Well, prior to this agreement that you all met together in '65 to revise, you all were revising an old agreement, were you not, sir?

A I don't recall whether or not it was prior to my coming with the City, or not, Mr. Dees; it could have been.

Q Let me --

A (Interrupting) It seems to me like Reverend Armstrong chaired one of those meetings, pertaining to the organization of the responsibilities. I am sorry, I can't remember.

Q Yes, sir.

(At this time, the Reporter marks document, "Plfs' Ex 25"; said exhibit is attached to the back of this deposition and made a part hereof.)

Q I show you what purports to be the Minutes of the Board of Recreation of the City of Montgomery for 1958, the Parks and Recreation Board, and I notice it may have been a few days before you took office, and I understand that we are going to get these Minutes from Mr. Hamilton, but --

A (Interrupting) That is approximately a year before I took office.

Q Right. Now, would you read for the record this paragraph that is designated "YMCA"?

A (Reading) "Mr. Hope reported on a meeting with representatives of the YMCA. Copies of a proposed agreement, as prepared by Mr. Bev Laws, were distributed to Board members, along with a separate sheet with a recommended change in item seven of the agreement. A motion was made, seconded and carried, that this proposed agreement, with the suggested amendment in item seven, be accepted, provided the proposed amendment is approved by the YMCA."

Q All right, now. And then, in 1965, you sent this letter out that you said Mr. Chandler drafted for you, calling a meeting for November the 9th, and you sent it to the Parks and Recreation Board, the City of Montgomery, all Parks and Recreation Board personnel, Community Center Board Chairmen, YMCA personnel, YMCA Branch Chairmen; now, did you -- are any of these people, here, connected with the Boys' Club --

A (Interrupting) None --

Q (Continuing) -- or any other civic organization?

A None.

Q All right. But this agreement that you said resulted from this particular thing, you said also covered the Boys' Club?

A I think it has, since that time, Norris. At this particular time, it did not. But the best I remember, it is either in writing or a mutual agreement that they do have an agreement with the Boys' Club.

Q But you don't know about any written agreement that has persisted over the past ten years?

A The one is predominantly just the YMCA and the City, here.

Q Just the YMCA and the City.

A The one we are speaking of here.

Q All right.

(At this time, the Reporter marks document, "Plfs' Ex 26"; said exhibit is attached to the back of this deposition and made a part hereof.)

Q Now, I show you Plaintiffs' Exhibit No. 26, and ask you if you will identify this document?

. . . Witness examines document . . .

A This is the proposed agreement between the YMCA and the City Recreation Department.

Q And what is the date on that -- is that a letter to you from --

A (Interrupting) This is a letter from Mr. Chandler to me, dated August the 20th, 1965.

Q And you received that letter from Mr. Chandler prior to calling these people together, right here, because this is a November 9th meeting. So, you got this from Mr. Chandler before you -- Mr. Chandler, who is Director of the YMCA, is that not correct?

A This is true.

Q All right, now. And you got this prior to the time of calling these people together to discuss the agreement --

you got the proposed agreement to look at?

A I don't recall.

Q Well, this letter is dated August 20th, '65.

A Well, when did this letter -- what was the date on it?

Q This letter, right here, calls for a meeting of November 9th, and you probably sent it out a week or two before the meeting; you wouldn't have sent it out six months before.

MR. HAMILTON: What year is that, Morris?

MR. DEES: Sixty--- I think '65.

MR. HAMILTON: Has it got a date on it?

MR. DEES: Well, you can furnish me with the original letter; that will be fine.

MR. PHELPS: Do you have a date on that one?

MR. DEES: No; no date. It is in the YMCA Minutes. I can tie it up as to the Minutes.

A Apparently, this is suggested, because this is the way it is worded here.

Q All right. That was suggested?

A Yes.

Q The point I am trying to make, Mayor, without having to go through the Minutes of all these organizations, you had had some conversations, evidently, with Mr. Chandler, or with

people, and he sent you a copy of a suggested agreement on August the 20th, 1965?

A According to this, yes.

Q And that is the revised agreement of the one previously in existence?

A I am assuming it must be.

Q All right.

MR. PHELPS: Now, what is the date on that letter?

MR. DEES: August 20, 1965.

A I don't recall the first agreement; it must have been prior to my taking office.

MR. DEES: Have you got the letter there, of this agreement, Joe?

MR. PHELPS: I have got what you introduced in that other deposition.

MR. DEES: All right; I see.

Q All right, now, Mr. Mayor, so we can tie these things together, you wrote a letter that called for a meeting on November 9th, of all the YMCA officials to look over this agreement. Now, you didn't send this letter out before you got this letter from Chandler, sending you the suggested agreement, did you, sir?

A According to this, not.

Q All right. So then, the purpose of this meeting, then, was to call these various YMCA and City officials together to discuss the proposed agreement?

A This is true.

Q All right. Now, I show you --

MR. DEES: Let's mark this.

(At this time, the Reporter marks document, "Plfs' Ex 27"; said exhibit is attached to the back of this deposition and made a part hereof.)

Q Now, Mayor, did a written agreement result from this meeting, which was the result of the combined efforts of the YMCA and City officials meeting together; did a cooperative agreement and committee result?

A I am sure it did.

Q Now, I will show you Plaintiffs' Exhibit No. 27, and ask you is that not a copy -- and you can look at the back page, it has a date on it -- of that final agreement?

. . . Witness examines document . . .

A What was the date on the suggested agreement?

Q August the twenty--- August the 20th, 1965.

A There was one in November, though.

Q November the 9th was when you called everybody together.

A Well, this is dated November the 8th.

Q Well, I assume that that was the agreement that was presented when everybody got together there, is that not correct?

A Mr. Dees, I don't know.

Q Mr. Hamilton, the City Attorney might be very familiar with this document?

A Probably Mr. Andrews could collaborate on either one -- in all probability, it is.

Q You don't know of any other agreement --

A (Interrupting) No, I do not.

Q (Continuing) -- with the "Y"?

A No, I do not.

MR. HAMILTON: I am not familiar with that.

MR. DEES: Well, we will tie it in with Mr. Andrews.

Q Now, this agreement, this document you are holding, Plaintiffs' Exhibit No. 27 --

MR. HAMILTON: (Interrupting) I don't think that is an agreement, if I may say so. That says, "Objectives", up there.

MR. DEES: All right.

Q Well, this document, Plaintiffs' Exhibit No. 27, then, as far as you know, this is the latest written document between the City and the YMCA?

. . . Witness examines document . . .

A I think Mr. Andrews would be in a better position to answer that, Mr. Dees, than I would. I don't know whether there is any other agreement since that time or not.

MR. DEES: Mr. Andrews, since you are in the room, and to just save a little time, would you just look at this? You are one of the parties in the lawsuit. See if that is not -- I got that from you -- the final agreement.

MR. PHELPS: Let me ask you something, while he is looking at that. This Plaintiffs' Exhibit 26, does this purport to be a copy of what Mayor James received from Mr. Chandler?

MR. DEES: Yes. I got it from Mr. Andrews.

MR. PHELPS: You have got it "Plaintiffs' Exhibit 26; is your statement to this record of Mr. Andrews?

MR. DEES: Yes, let him see how it looks, and if this could have come from Mr. Chandler. This came from Mr. Chandler's files.

MR. PHELPS: Let's get this on the record.

MR. ANDREWS: Let's get that on the record, because it is not on the record; right.

MR. PHELPS: Well, then, you don't purport to put in this record this pencilled-in portion of the attachment to Plaintiffs' Exhibit 26?

MR. DEES: No, nothing but the original -- no, nothing but the written material.

MR. PHELPS: Written material -- you mean, the typed --

MR. DEES: (Interrupting) The typed material, yes. I did receive that from Mr. Andrews, and I will show you where I got it. That is a blind copy to the Mayor, with the original -- that is not a blind copy, but that is a letter to the Mayor, which there was a blind copy of a similar letter to Mr. Andrews.

MR. HAMILTON: Who put all that pencil scratching on it?

MR. DEES: I assume that is Bill Chandler. We will submit the document without the scratching. Mr. Andrews, you were looking at a document there, and for the help of the deposition, now, do you recognize that as the last written document between the YMCA and the City of

Montgomery?

. . . Mr. Andrews examines document . . .

MR. ANDREWS: I think it is identical; I think it is.

MR. DEES: Okay. So, to your knowledge, Mr. Andrews - I am talking to Mr. Henry Andrews, who is a party in this suit -- this document, "Plaintiff's Exhibit 27," then, is the last written document, to your knowledge?

MR. ANDREWS: (Nods head affirmatively)

MR. DEES: And you are answering "yes"?

MR. ANDREWS: Yes, sir.

MR. DEES: Thank you, sir.

Q (By Mr. Dees) Mr. Mayor, we were talking about that early agreement with the YMCA, and you said that you didn't remember exactly whether you had any knowledge of this early agreement or not. I would like to --

MR. DEES: Let's mark this --

MR. PHELPS: (Interrupting) I don't believe the Mayor testified he didn't know whether or not he had knowledge.

MR. DEES: Well, he said he wasn't sure exactly whether that first agreement was enacted during his administration, and I want --

MR. PHELPS: (Interrupting) That is not what you just said he said.

MR. DEES: Well, I am trying -- I think I can pin it down a little more clearly. Let's mark this as Plaintiffs' Exhibit 28.

(At this time, the Reporter marks document, "Plfs' Ex 28"; said exhibit is attached to the back of this deposition and made a part hereof.)

Q Mr. Mayor, I show you Plaintiffs' Exhibit No. 28, which purports to be "Minutes of Meeting, Parks and Recreation Board, November 10, 1959", and ask you to read this part where it says, "Meeting with YMCA;" just read that section in there.

A (Reading) "Mayor James has requested that Mr. Hope, Mr. Strassburger and members of our staff and representatives of the YMCA meet in the Mayor's office at the earliest possible date to review the agreement made with the YMCA in regard to a coordinated program. It is felt that both this department and the YMCA can operate basketball programs on Saturdays without conflicting with each other. A motion was made, seconded and carried that Mr. Frederick contact representatives of the YMCA and arrange the meeting with the Mayor."

Q How, I believe, Mr. Mayor, prior to this time, there had been no written agreement with the YMCA?

A This is where the state of confusion rests. I don't recall.

Q You don't recall?

A There must have been some reason for it, though, because whether there was a written agreement, or there had been some discussion pertaining to it, prior to my taking office -- this is one month after I took office.

Q Right. And as I believe you recall, the parks had been closed approximately nine months before this?

A They were closed prior to my taking office, but I don't recall the exact date.

MR. HAMILTON: I think the record shows when they were closed.

MR. DEES: In fact, it was January 1, 1959, when they were closed.

MR. HAMILTON: It is in the record.

A It wasn't in '59. It wasn't January 1 --

MR. DEES: (Interrupting) It was December 31st, 1958, to be exact.

A Yes, because it wasn't during my term of office.

MR. DEES: Well, I think we can find it.

Q (By Mr. Dees) So, you went personally, I understand now, before the Parks and Recreation Board, and requested Mr. Hope and Strassburger to meet with the YMCA, at your initiative?

A According to this document.

Q All right. And you don't disagree with this document, do you?

A No, I don't disagree with it.

MR. PHELPS: That was with reference to Saturday afternoon basketball?

MR. DEES: I think the document speaks for itself. It says, " ... to review the agreement made with the YMCA regarding a coordinated program."

MR. PHELPS: Let me see that.

MR. DEES: He read it all in there. It talks about basketball and other programs.

Q (By Mr. Dees) Now, Mr. Mayor, do you know, then, that as a result of this meeting, a document was, in fact, drawn up, and a coordinating committee between the YMCA and the City was formed?

A I wish I could truthfully tell you; I don't recall, Mr. Dees. In all probability it was.

Q All right. Now, do you feel, Mr. Mayor, that over

the past ten years, that the City and the YMCA have pretty much lived up to their agreement?

A I do.

Q So, in other words, if the agreement -- I believe, let me see -- off the record.

. . . At this time, an off-the-record discussion was had . . .

Q This agreement, then, designated certain recreational activities that would be the responsibility of the City, and certain recreational activities that would be the responsibility of the YMCA, is that --

A (Interrupting) Apparently, when they first started out, according to this, was limited activities, but this expanded it, apparently; this agreement, here.

Q I see.

A The one that Mr. Andrews said was the last document.

Q Mayor James, where do the black people in Montgomery swim?

A I am assuming it must be at the Cleveland Avenue YMCA pool.

Q Where do the white people swim?

A At the YMCA pools, also; at the Country Club; and various other places.

Q The City doesn't operate any swimming pools?

A It does not.

Q There are vacant pools -- I believe there is one in Washington Park, right now, is there not, sir?

A A wading pool.

Q Wading pool; and it is empty?

A That wouldn't constitute a swimming pool.

Q But I mean, this is a place you can get wet in -- little kids. If you are a small kid, it would come up waist high on you, wouldn't it?

A (Nods head affirmatively)

Q All right. So, it would be swimming to them, wouldn't it?

A (Nods head affirmatively)

Q All right. Now, in other words, the City, then, hasn't reopened the swimming pool, has it?

A They have not.

Q I believe there is a swimming pool that is still existing in Kiwanis Park?

A Kiwanis Park.

Q And that is fixing to be tore up, isn't it?

A I don't know whether the pool will be part of the program where the Historical Commission will take over, or not.

Q And that pool is empty, isn't it?

A Yes, it is empty.

Q And I understand from the documents presented, the Oak Park big swimming pool was actually not in existence at t time of the lawsuit; I believe it was last operated in '54 or '55?

A I don't recall.

Q Well, anyway, do you know that that swimming pool out there was not torn up until 1968?

A This is correct.

Q And also --

MR. HAMILTON: (Interrupting) '67, I believe.

MR. DEES: '67? I have got the demolition chart on it, somewhere. Mr. Andrews, was it '66, '67 or '68?

MR. ANDREWS: '67.

MR. DEES: '67.

Q (By Mr. Dees) Now, that was a real big swimming po wasn't it; everybody could get in -- I mean, it was a full si swimming pool, comparable to YMCA's in regard to size?

A I wouldn't classify it as a big one, no.

Q But I mean, it was over your head?

A Oh, yes.

Q You could jump off the high dive?

A (Nods head affirmatively)

Q You also had some wading pools out there, didn't you?

A Had one wading pool, to the best of my knowledge, up in the area where the Planetarium is at the present time. Whether there was another one, I don't recall.

Q Now, this document that has been identified, here, as the last written document, that you said has been followed pretty well, what does it say under "Swimming", there?

A (Reading) "All swimming programs are the responsibility of the YMCA."

Q I see.

A That simply meant that the City of Montgomery, the Recreation Department, didn't conduct any swimming programs.

Q I see. Didn't compete with the YMCA?

A No, it did not. If we had had the pools, we would have been competing with them, but we didn't have them.

Q I see. And you had had a lot of requests -- you had had requests from black citizens of the community, as well as white citizens, to provide some swimming pools, hadn't you?

A Not many.

Q Black citizens hadn't requested it?

A Not many.

Q But there have been some requests?

A There have been a few.

Q All right. Did you, as Mayor of the City, investigate to see whether the pools in existence could be repaired, or could be used?

A I was informed that the pool was in a very dilapidated condition, and I was also informed that the Health Department had made several inspections pertaining to it, and also, that the chlorination system was in bad condition.

Q You all have a big pool down there at the Square, haven't you, that is called a "Fountain"?

A I wouldn't classify it as a pool. People don't go swimming there too often.

Q But it has water in it, doesn't it?

A Sometimes.

Q It develops leaks, and things like that. And over the past ten years, you all have spent some money repairing that thing?

A That is right.

Q A major remodeling job on it, in fact?

A Well, I wouldn't --

Q (Interrupting) Since you have been in office?

A It wouldn't constitute major remodeling; it needs to

be major overhauled.

Q You all took care of the maintenance on it, didn't you?

A Yes. Doing some work down there now.

Q Right; I see. You are not doing any work to repair these wading pools that are still in existence?

A No.

MR. PHELPS: We object to him arguing with the witness. This witness has stated four times that the City of Montgomery doesn't go into the swimming pool program. I don't see any need to argue or get back into it. We object to it.

Q Well, Mr. Mayor, as far as your own feeling is concerned, you looked -- in other words, as late as, say, 1969, last year, when you thought of swimming, you looked as if -- that that was the YMCA's responsibility to operate any pools, even if the City built the pools; wasn't that your understanding?

A No.

Q It wasn't?

A No.

Q Mr. Mayor, I show you --

MR. DEES: Let's mark this.

(At this time, the Reporter marks document, "Plfs' Ex 29"; said exhibit is attached to the back of this deposition and made a part hereof.)

MR. DEES: Let's mark this, right here.

(At this time, the Reporter marks document, "Plfs' Ex 30"; said exhibit is attached to the back of this deposition and made a part hereof.)

Q Mr. Mayor, this document I show you is marked "Plaintiffs' Exhibit 29", which is also Plaintiff's Exhibit 59 in U. S. District Court, in the YWCA case. I want you to look at that, which states at the top, Minutes of the Board of Directors of the Montgomery YWCA, February 10, 1969, and ask you to look at this part, right here --

MR. PHELPS: (Interrupting) Let me ask a question right here. Was the Mayor present at this meeting?

MR. DEES: No; no. The Mayor was not on the YWCA Board. I just want to ask him does he agree that this is an accurate reporting.

MR. KNABE: He doesn't know whether that is an accurate reporting.

MR. DEES: Well, I am going to ask him if he knows, and if he doesn't know, then he can deny it.

Q (By Mr. Dees) Mr. Mayor, it states right here, under caption of "Cleveland Avenue -- Mr. Kitchen --" I believe you know Mr. Kitchen?

A Yes.

Q (Reading) "Reported that the Cleveland Avenue 'Y' had been contacted by the Mayor and requested to submit a proposal for the operation of three pools to be built by the Housing Authority and turned over to the City for operation. The YMCA would have full responsibility for the operation, and the cost of the operation would be borne by the City."

Now, did you -- is this accurate, did you, the Mayor, contact anybody in relationship to this?

A I can give you the history of the whole thing.

Q All right.

A Mr. Sullivan and I discussed the possibility of requesting from the HUD monies to build swimming pools at the housing projects. We felt that there was a real need for these pools there.

In order to provide the safety that would be

necessary, and in order that adequate supervision would be there, we felt like we ought to get someone that had knowledge of the whole thing. I contacted Mr. Bill Chandler, or either Mr. Sullivan did, one -- I don't recall which -- and Mr. Sullivan, in turn, said that they would operate the pools, and that they stated the price and all that they would operate the pools for.

Q Let me interrupt you. You said Mr. Sullivan said --

A (Interrupting) Mr. Chandler; Mr. Chandler, I believe this is correct. I am trying my best to straighten out my memory in regard to it. But later, Mr. Sullivan found that instead of using money for the pool purposes, they could build Community Center buildings, and it would be to a better advantage than the pools would be. And so, this is the reason they didn't build the pools.

Q I see. And I believe about this time, the YMCA suit was filed; you remember that?

A I don't recall.

Q All right. And so, this reporting of the February 10, '69 Minutes of the Board of Directors of the YMCA, that is substantially correct, then -- what you just said, that the YMCA had been requested to submit a proposal for operating these pools; that is substantially correct, isn't it?

MR. PHELPS: We object to Mr. Dees testifying. The Mayor has explained the background; I think his explanation speaks for itself.

MR. DEES: Well, continue -- answer my question. He has imposed an objection on a deposition. So, you make an objection and the Court will naturally take into consideration in --

A (Interrupting) My knowledge in regards to it is what I have stated, pertaining to it; and that either I contacted Mr. Chandler -- I know I had several conversations with him --

Q (Interrupting) I see. About the pools?

A (Continuing) -- about the pools, and I am sure that Mr. Sullivan did, too, because Mr. Sullivan contacted pools to find out what the cost would be to build the pools at those facilities.

Q All right. Now, then, I show you --

A (Interrupting) I still say they are needed there.

Q All right. I show you Plaintiffs' Exhibit 30, and ask you if you can identify this document?

. . . Witness examines document . . .

A This is pertaining to the same thing, and I am assuming that it must be the proposal that Mr. Chandler said that they could operate the pools for, and what would be

necessary to provide adequate safety there.

Q In other words, this is the letter that Mr. Chandler wrote you on February 19, 1969 --

A (Interrupting) That is right.

Q (Continuing) -- and you remember receiving this letter?

A That is right.

Q Carbon copies going to Henry A. Spears -- do you know Mr. Spears?

A Yes.

Q Was he the Director of the Cleveland "Y", at that time?

A I don't know whether he was Director; he was with the YMCA, I know, at the time. Was there a copy also sent to the Housing Authority?

Q No, sir, I don't see a copy of that. And this proposal sent back by Mr. Chandler, states, "Proposal for Pool Operation by the Cleveland Avenue YMCA," does it not, sir?

A It does.

Q Do you know what housing project that this pool was supposed to be going in?

A That would depend entirely upon the Housing Authority itself. We wouldn't have any jurisdiction as to where they

would go.

Q Mr. Chandler -- did he have any knowledge, at the time, where these should go; which housing projects they were going to be in?

A I am sure he contacted Mr. Sullivan, and it was explained to him where they were supposed -- it seems to me like one was going to be at Gibbs Village. I just don't recall.

Q Gibbs Village -- now, that is a pretty much predominantly black project?

A That is true. Of course, by Federal Law, all of them are integrated.

Q But by practice, it is pretty much a predominantly black project?

A That is true.

Q And the Cleveland "Y", who was going to -- he proposed to operate this -- is predominantly a black "Y"?

A That is true.

Q Mr. Mayor, I read in the paper recently, and I believe your lawyers furnished some kind of documents to back it up, that the City Commission had made a vote to allow Kiwanis Park to be used to put various old homes that were going to be torn down, you know, because of progress being made -- to move those homes over there, and put them on Kiwanis Park, is that correct, sir?

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF ALABAMA

NORTHERN DIVISION

GEORGIA THERESA GILMORE,
et al,

Plaintiffs

vs.

CIVIL ACTION

NO. 1490-N

CITY OF MONTGOMERY, ALABAMA,
et al,

Defendants

DEPOSITION OF MR. HENRY M. ANDREW,

taken pursuant to notice and subpoena duces tecum, on behalf of the Plaintiffs in Room 207, United States Post Office and Court House Building, Montgomery, Alabama, before Christine Wilcox, Reporter and Notary Public for the State of Alabama at Large, on Thursday, September 17, 1970, commencing at 3:00 P.M.

APPEARANCES

MORRIS S. DEES, JR., Esq. and JOSEPH J. LEVIN, JR., Esq., Levin and Dees, 210 Washington Building, Montgomery, Alabama; and

SOLOMON S. SEAY, JR., Esq., Gray, Seay and Langford,

352 Dexter Avenue, Montgomery, Alabama, Attorneys for the Plaintiffs.

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WALTER J. KNABE, Esq., Capell, Howard, Knabe and Cobbs, 57 Adams Avenue, Montgomery, Alabama; and

DRAYTON N. HAMILTON, Esq., Hinson and Hamilton, 26 South Perry Street, Montgomery, Alabama, Attorneys for the Defendants.

STIPULATION

It is stipulated and agreed by and between counsel representing the parties that the deposition of MR. HENRY M. ANDREWS may be taken before Christine Wilcox, Reporter and Notary Public for the State of Alabama at Large, without the formality of a commission; and all formality with respect to other procedural requirements is waived; that objections to questions, other than objections as to the form of the question, need not be made at this time, but may be reserved for a ruling at such time as the deposition may be offered in evidence or used for any other purpose by either party, as provided by the Federal Rules of Civil Procedure.

It is further stipulated and agreed that the signature of the witness to this deposition is hereby waived by all parties and witness.

MR. HENRY M. ANDREWS, of lawful age, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DEES:

Q Would you state your name for the record, please?

A Henry M. Andrews.

Q Mr. Andrews, what is your position?

A I am the Director of the Parks and Recreation Department for the City of Montgomery.

Q Do you also waive your signature on the signing of this?

A Yes, sir.

Q All right. Mr. Andrews, how long have you been employed by the City of Montgomery?

A A little over twenty years.

Q And how long have you been employed by the Parks and Recreation Board?

substitute it for this other document.

A All right, sir. I brought it for that purpose.

MR. DEES: All right. Now, if you will just mark this --

MR. HAMILTON: (Interrupting) Does this have any notations on here that shouldn't be on here?

A No, sir, I think all those notations were made -- I was serving on that Committee at that time, Mr. Hamilton, and I think all of those notations on there are notations that would have bearing upon the document.

Q They all have bearing on the document, itself?

A Yes, sir. They were just for my private notations, that is all. You probably can't read them.

(At this time, the Reporter marks document, "Plfs' Ex 43"; by agreement of counsel said exhibit was substituted for the previously marked "Plfs' Ex 43", and is attached to the back of this deposition and made a part hereof.)

Q I show you Plaintiffs' Exhibit 43, and ask you if you would now identify this?

A This is the Committee that we have had so much

discussion about. It was appointed to set up as a guide to help coordinate different programs for the YMCA and the City of Montgomery Recreation Department, to try and prevent overlapping of agencies and duplication of programs, which the Parks and Recreation Department felt should be done, because they did not want to use taxpayers' money to duplicate programs, when they needed so many programs in the City, and needed this money to carry on these programs.

Q Well, now, this particular thing you are referring to, here, was -- was not the coordination agreement, itself, I believe, this Plaintiffs' Exhibit 43, was the result of a study, was it not, to determine what particular recreational activities were being carried on in Montgomery?

A Well, no, sir, I wouldn't say that that was a study of all the activities that were being carried on in Montgomery, no, sir, I --

Q (Interrupting) Recreational activities, I mean.

A Well, I wouldn't say that this was a study of all the recreation activities that were --

Q (Interrupting) What was it a study of?

A (Continuing) -- carried on, because we have no mention in this thing of other programs that were being carried on in the city at this time.

Q By, anyway, does this give -- was the purpose of this Document 43, was this a result of a study that was conducted at the request of Mrs. James Pitts Hill, Chairman of the Parks and Recreation Board, and Mr. Charles Brightwell of the YMCA, of which I believe you received a copy of this particular study; was it not the study --

A (Interrupting) I worked on the study. If you will notice, it is signed by Henry Andrews, Wade Eubanks, Murray Frederick and Bev Laws.

Q Now, Bev Laws is a YMCA official, was he not?

A Yes, sir.

Q Henry Andrews and --

A (Interrupting) Murray Frederick.

Q (Continuing) -- Murray Frederick and Wade Eubanks were all City officials?

A Now, Mr. Dees, whether Wade was with us or with the "Y" then, I am not sure.

Q All right; you are right. Mr. Andrews and Mr. Murray Frederick were both City officials?

A Yes, sir.

Q And Mr. Eubanks was the YMCA official?

A Yes, sir.

Q All right. Now, let me show you Plaintiffs'

Exhibit No. 44, and that is Plaintiff's Exhibit 1 from your deposition in the YMCA case, and you brought this to me, do you recognize this?

(At this time, the Reporter marks document, "Plfs' Ex 44"; said exhibit is attached to the back of this deposition and made a part hereof.)

. . . Witness examines document . . .

A Yes, sir, I have the original, right here.

MR. DEES: You can keep the original, if you like. I will be pleased to have this.

Q And this comes from the files, I guess, of the Recreation Department, is where you brought it from?

A Yes, sir, I brought this in at your request, during the "Y" case.

Q All right. Now, in this letter, here, is it not to Mrs. Fitts Hill, who is Chairman of the Parks and Recreation Board, for the purpose of making this study, right here; is that right, sir? The letter is dated May 1958 -- the 3rd.

A May the 3rd, 1958; it is signed by Mr. Royce Kersha

Q He is a YMCA official -- is that correct, sir?

. . . Witness examines document . . .

A Yes, sir, that is correct. But you said this was a study, and it makes no mention of a study. It says, "Charlie Brightwell has informed me that the Parks and Recreation has appointed a coordinating committee to work with the YMCA. I am extremely pleased, because it is the desire of all of us that the youth of Montgomery be served in the most effective program possible."

Q All right; that is fine. And then, as a result of this letter, you were appointed, along with other people, to work up this Exhibit 43, right here, is that correct?

A Yes, sir.

Q Now, after this Exhibit 43, here -- it is entitled, "YMCA-City Recreation Coordinated Athletic Program," was this not then reduced to writing in the form of a breakdown of all the various activities, or is this the document, itself, that served until it was revised in 1965?

A No, sir, there was another mimeographed bill that was sent out at that time --

Q (Interrupting) Do you have a copy of it with you?

A I don't know whether I have a copy of it or not. You should have a copy in your files, of it, Mr. Dees.

. . . Mr. Dees searches records . . .

A I introduced it in the "Y" case, and you should

have it there.

MR. DEES: Let me look here a moment. I think I will have you pick it out of the ones I have got. There were so many of those, that they all look alike to me. Here is a stack of these agreements; you just tell me which one it is.

. . . Mr. Dees hands stack of documents to witness, who examines same . . .

A These all bear the word "suggested"; our final draft of this did not have the word "suggested" on it.

MR. DEES: Well, I will just have to do without making a copy of that.

Q You did, though, make a final draft of this Coordinating Committee?

A Yes, sir.

Q And from 1959, when this final draft, I believe, was done, until 1965, the City and the YMCA pretty much operated along the lines of the agreement, is that correct, sir?

A Yes, sir. As I have said before -- of course, in agreements like this, there is bound to be some clashes of personalities, and there were some clashes of personalities; there is bound to be some stepping on of toes, and there was

some stepping on of toes, in carrying this out. As to carrying it out to the letter of the word, it was not. And I can vouch for that, because I happened to be Program Director at that time. It was my job to see that this was carried out. And on numerous occasions, I had to go settle arguments that were brought up about this agreement.

Q So, what you are saying is, then, you tried your best to make sure things were carried out under the agreement, is that what you are saying?

A Yes, sir.

Q And you negotiated arguments that came up, didn't you, relative to the agreement?

A With my staff.

Q Is that what resulted, then, in the need to reformulate the agreement in 1965, because there were some problems and conflicts, et cetera?

A Yes, sir, as has been already recorded, I believe, that during this session, that we felt like it should be gone over again and reviewed again. And that was the reason that we went back and reviewed it.

Q And you participated, actually, in the making of the first agreement and in the making of the second agreement, did you not?

A Yes, sir.

Q And is your answer the same now as it was when you testified in the YMCA case, when you were asked the question, "Did you substantially follow the agreement?" And your answer --

MR. PHELPS: (Interrupting) Where are you reading, Morris?

MR. DEES: I am reading from the transcript of his testimony.

MR. PHELPS: What page?

MR. DEES: On Page 12.

Q (By Mr. Dees) And did you not answer Mr. Gray, who was questioning you, "Substantially, yes, sir." Is that still your testimony today?

A Yes, sir; substantially, yes.

Q All right.

A Mr. Dees, just for my information, go back to that reference you made there; did he say which agreement?

Q I don't really know. My question was whether or not the City and the "Y" operated jointly under that agreement from the time it was approved in 1965.

A In 1965. I just wanted to make sure.

MR. PHELPS: Well, now, I think you said "approved

in 1965"; in 1958 until 1965, when it was revised.

MR. DEES: Well, I think I can clear it up by saying it this way.

Q (By Mr. Dees) Your answer that you substantially followed agreements, would apply to both agreements, wouldn't it -- the revised agreement and the original agreement?

A Yes, sir.

Q All right; that is fine.

A I just wanted to make sure that that revised agreement was in there, because we had some upkeep on the field, so we had to straighten it out.

Q You gave some testimony from the stand in the YMCA case, it appears on Page 18, concerning the baseball program for the City of Montgomery, and you made the statement that formerly everything in the City was Little League. Now, that was prior to the Dixie Youth baseball. Now, when was that; what date was that when everything was the Little League?

A I would have to refer to the notes for that. I was not the Athletic Director.

Q Was it during the last ten years?

A As I said, Mr. Dees, I wouldn't even venture a guess on that.

Q Where are your notes, now, that you can refer to on that?

A Well, I would have to get them from Mr. Bozeman.

Q Mr. Bozeman?

A Yes, sir. That is in our original file, athletic file.

Q Could you inform me of the -- as to when --

A (Interrupting) I could not even inform you as to what day we franchised our first Little League field. I know our first Little League field was at the Bellingrath area, but what year that was, Mr. Dees, I would even hate to venture a guess. I know where the field was; I know who set up the program, and all about it.

Q All right.

A There was only one team at that time, when we set it up.

Q I believe you answered in that case that, "In the past, yes, sir, that is what we started off with. We started off with a Little League program."

A That is correct.

Q And Mr. Gray asked you the question, "All right, sir. The Little League program was, in fact, a predominantly white program, was it not, when it started?" You said, "Now --

no, sir." His question was, "I said, when it started;" and your answer was, "When it started?" And he said, "Yes," and your answer was "Yes."

MR. PHELPS: Where is that?

MR. DEES: Page 19 and 20.

Q So, in effect, is your testimony the same today, that when the Little League first started, it was a white Little League program, is that correct, sir?

A That is correct.

Q And, now, that same Little League program is a black Little League, or at least there is --

A (Interrupting) No, sir; no, not that same Little League program. Now, Mr. Dees, I told you to start off with, at the beginning of this statement, that that was a franchised league. Now, there has already been on record, during this testimony that has been given today, that this team that you are talking about, now, is not a franchised team.

Q All right, then, for the record, then, the team that is in Montgomery now, called the Little League, that is a predominantly black team, is that correct?

A Yes, sir, the one there, the so-called "Little League", is predominantly black.

Q All right.

A That is their wishes.

Q When you say "their wishes", do you mean the black people?

A Well, Mr. Dees, whoever was --

Q (Interrupting) You said "their"; I just wanted to know who "their" is?

A Of course, it was the people that were interested in the program.

Q And "their", those are black people?

A Well, I would assume they were black people.

Q All right. Does the City of Montgomery, today, operate any tennis courses -- courts?

A You said "courses" before; that was correct. You read it correctly "courts". Yes, sir, we operate some tennis courts. We operate the same ones, I believe, that I gave in that testimony. We still have those courts at Capitol Heights, and we still have the ones out at Goodwyn Community Center. The Goodwyn Community Center courts are lighted courts. We have now, also, one court that has been put in just recently, in the last several weeks, at Baldwin.

Q All right, then. Is Capitol Heights and Goodwyn predominantly white Community Centers? I believe you answered that "yes" in your previous testimony. Is your

answer still "yes"?

A Yes, sir.

Q All right.

MR. PHELPS: It wouldn't be as strong a "yes" as it was a year ago.

Q Well, let me -- when did you build these courts at the Capitol Heights and Goodwyn Community Centers?

A When did I build them?

Q When were they built by the City?

A When were they built by the City? Did I say they were built by the City?

Q I don't know who built them.

A Do you have any testimony that says I built them -- that they were built by the City?

Q When were they built by anybody?

A Well, that, I couldn't tell you, but I assure you they were not built by the City.

Q Well, who built them?

A Well, I don't know whether I should go on record saying who built them -- should I?

MR. PHELPS: If you know, tell him.

A If I know, tell him. All right, sir, they were built by the Highway Department.

Q State Highway Department; at those two Centers?

A And that is the reason I asked you should I do it. Yes, sir.

Q All right. Now, they were built by the Highway Department at those two Centers?

A Yes, sir, they --

Q (Interrupting) State of Alabama Highway Department?

A They came in there and put the surfacing on those courts, way back yonder; I don't know how many years it has been. They were out there --

Q (Interrupting) That is the State -- I am sorry -- that is the State of Alabama?

A That is the State of Alabama. They were out there doing some work, at that time, in that particular area, and they went out there and did it. Of course --

Q (Interrupting) Who instructed them to do it, do you know?

A Well, I just imagine the Community Council requested it.

Q Any work done on those Community Centers has to be approved by the Parks and Recreation Board, doesn't it, to build something like a tennis court?

A Mr. Dees, that happens to be school grounds, and the

only thing we do on school grounds, of course, we lease them, and that is up to the schools. And I imagine it was cleared through the schools. Of course, you are familiar with this document (indicates). You saw this document and didn't accept it last time. I will let you look at it again. I don't know whether you will accept it this time or not.

. . . Witness hands document to Mr. Dees, who examines same . . .

MR. DEES: The document he refers to is a Joint Use document with the City and the public schools, signed by the Mayor of Montgomery in 1948, and the President of the School Board in 1948.

Q And there have been no tennis courts built at any of the predominantly black Community Centers, is that correct?

A Well, now, when you say tennis courts built, of course, any hard surface area that we build on any of these areas can be used for tennis. I would say that there have actually been no requests for us to place goalposts on these hard surface -- I mean, tennis net posts on these hard surface areas for the use of --

Q (Interrupting) So, there are no designated tennis courts, then, on these areas?

A No, sir you say --

Q (Interrupting) These hard surface areas are like basketball --

A (Interrupting) Whatever they want to -- prefer to play on them. If they want to play shuffleboard on them; if they want to play badminton on them; whatever they want to play on them, they make the request to the Department, and the Department goes out there and puts in what it takes to put in the court.

Our there at Washington Park, they have a beautiful area that could be used for tennis, but they, I think prefer basketball, and I don't blame them.

Q You think the blacks out there prefer basketball?

A Yes, they sure do.

Q In preference to tennis?

A Yes, sir, I would say so. If they hadn't, they would have requested the tennis court out there. Of course, one of our outstanding tennis players happens to be a Negro, and if you have ever seen him play, he sure is a wonderful tennis player, the United States Tennis Team. He is a very outstanding man.

Q I asked you to bring with you -- first, let me -- I have a couple of things I would like to mark as exhibits

before we go on with this.

MR. DEES: Mark these three items, right here.

(At this time, the Reporter marks documents, "Plfs' Ex 45"; "Plfs's Ex 46"; and "Plfs' Ex 47"; said exhibits are attached to the back of this deposition and made a part hereof.)

Q I show you Plaintiffs' Exhibit No. 45, and ask you if you would identify this?

. . . Witness examines document . . .

A Yes, sir, this was a letter addressed to me while I was serving on this particular Board.

Q Is that letter -- who is it from?

A Mr. William C. Chandler.

Q And is it relative to the coordinating agreement?

A Yes, sir.

Q I show you --

A (Interrupting) That is the updating -- that date should be put on record, that date is '65. That is the updating of this old agreement that we had.

Q All right. And I show you Plaintiffs' Exhibit 44, and ask you who is this a letter from -- 46, I am sorry -- and

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF ALABAMA

NORTHERN DIVISION

GEORGIA THERESA GILMORE,
et al,

Plaintiffs

vs.

CITY OF MONTGOMERY, ALABAMA,
et al,

Defendants

CIVIL ACTION

NO. 1490-N

DEPOSITION OF MR. DURWOOD LEE BOZEMAN, taken pursuant to notice and subpoena duces tecum, on behalf of the Plaintiffs, in Room 207, United States Post Office and Court House Building, Montgomery, Alabama, before Christine Wilcox, Reporter and Notary Public for the State of Alabama at Large, on Thursday, September 17, 1970, commencing at 1:15 P.M.

APPEARANCES

MORRIS S. DEES, JR., Esq. and JOSEPH J. LEVIN, JR., Esq., Levin and Dees, 210 Washington Building, Montgomery, Alabama; and

SOLOMON S. SEAY, JR., Esq., Gray, Seay and Langford, 352 Dexter Avenue, Montgomery, Alabama, Attorneys for the Plaintiffs.

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WALTER J. KNABE, Esq., Capell, Howard, Knabe and Cobbs, 57 Adams Avenue, Montgomery, Alabama; and

DRAYTON N. HAMILTON, Esq., Hinson and Hamilton, 26 South Perry Street, Montgomery, Alabama, Attorneys for the Defendants.

STIPULATION

It is stipulated and agreed by and between counsel representing the parties that the deposition of MR. DUEWOOD LYNN BOZEMAN may be taken before Christine Wilcox, Reporter and Notary Public for the State of Alabama at Large, without the formality of a commission; and all formality with respect to other procedural requirements is waived; that objections to questions, other than objections as to the form of the question, need not be made at this time, but may be reserved for a ruling at such time as the deposition may be offered in evidence or used for any other purpose by either party, as provided by the Federal Rules of Civil Procedure.

It is further stipulated and agreed that the signature of the witness to this deposition is hereby waived by all parties and witness.

MR. DURWOOD LYNN BOZEMAN, of lawful age, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DEES:

Q State your name for the record, please.

A Durwood Lynn Boseman.

Q Mr. Boseman, for the record, you are a white man, is that correct?

A Yes, sir.

MR. DEES: I believe -- and also for the record, so the record will indicate, Mr. Strassburger, the Chairman of the Parks and Recreation Board, is also a white man. Do you stipulate that?

MR. PHELPS: Yes.

MR. DEES: Would you also stipulate that all the members of the Parks and Recreation Board are also white?

MR. PHELPS: Yes.

Q The other people that we have taken testimony from

this morning waived their signature to the deposition. I guess your attorneys would advise you to do the same. We need to get that clear, before we go forward.

MR. PHELPS: Mr. Bozeman, what he is talking about, under the Federal Rules of Civil Procedure in Federal Court, you have a right to read your deposition and sign it, before it is filed in Court, or you can waive that signature, if you so desire. By reading it, you are really insuring that the Court Reporter, here, gets what you say, down accurately. And I can state to you that she is an accurate Court Reporter, and I can advise you that it will be all right to waive your signature.

THE WITNESS: Okay.

Q Mr. Bozeman, what is your present job title?

A Athletic Director Supervisor.

Q For what, the City Recreation Department?

A All sports.

Q For the City of Montgomery?

A City of Montgomery.

Q All right. Now, how long have you held this position?

A Well, I have been with the city a little over two and a half years, but now, on this position, when Mr. Murray Frederick died, which was roughly ten months ago, the rest of it was turned over to me.

Q All right.

A And they went over there and fixed it up; lined it off.

Q By "they", do you mean the City Recreation Department?

A Yes.

Q Lined off Bruce Field?

A That is right.

Q Is that a pretty nice field?

A When I played baseball on it, it was.

Q All right; I see. Let me show you these exhibits, and ask if you can identify them, please. This is Plaintiffs' Exhibit 32; what is this?

. . . Witness examines document . . .

A Now, on baseball in this town, we furnish the fields, we furnish the lights, we furnish home plates, we furnish the bases; they, themselves, set up, which is -- we don't control at all, through Babe Ruth. Now, I can help you on this.

Q I just asked you what this is?

A This is a schedule that was sent to me.

Q A schedule of what?

A They called themselves "Babe Ruth" on this.

Q All right, now. That is Exhibit 32. Now, who sent that to you?

A Well, let's go back, now, a little bit. Their Commissioner is a Mr. Mills, in Babe Ruth ball and what they call "Little League" ball.

Q And that is a black league?

A That is right, and I will try to help you on this, too.

Q So, Exhibit 32, then, is a schedule for the black Babe Ruth --

A (Interrupting) They call themselves "Babe Ruth". You are not anything until you are franchised.

Q Well, I understand that, but for the nomenclature they use now, it is "Babe Ruth"?

A Babe Ruth.

Q Schedule, Exhibit 32, is the what, the 1970 schedule for the black Babe Ruth League?

A That is right.

Q All right. Now, what age youngsters are these?

A Thirteen, fourteen and fifteen.

Q All right, now. Is there also not a Babe Ruth League for those, about the same age people, operated in Montgomery for whites?

A That is right.

Q Okay.

A But, now, this league don't have anything to do with that.

Q Both of them are called "Babe Ruth", though?

A You can be called anything.

Q I understand that. This is called a "Babe Ruth" League, Babe Ruth Great League. Is the white Babe Ruth League called the "Babe Ruth White League"?

A Now, that is something -- there are four different divisions in Babe Ruth, which now, they can have anybody that is in a district. Now, this Babe Ruth, when you are franchised, it is set up in districts, which we don't have anything to do with. This is set up by your State Commissioners, and your Montgomery Commissioner is Mr. Allyn McKeen.

And people come down here -- when I say "people", the Commissioners come down here and set up a boundary, and then, whoever is in that boundary, that is where you play. You go on and try out for the team. And all these managers is what you call "Volunteer Help"; there is no pay in it.

Q Now, the City -- I am sorry?

A And the City does not pay any manager, in any of the teams, Little League, Babe Ruths, any of them.

Q I believe the City pays the referees for the black baseball leagues, for the Little League and the Babe Ruth?

A No, sirse, not baseball.

Q They don't pay the referees for the games --

A (Interrupting) Not in baseball.

Q (Continuing) -- by the Little League?

A No, sir.

Q Not for the --

A (Interrupting) Not for anybody.

Q They don't furnish equipment, or baseballs, or things like that, for the black Little League?

A I can tell you every bit I furnished to every one of them.

Q But they do, in fact, furnish some equipment, is that right?

A We furnish -- we give them one dozen balls; I give them eight bats; I give them a chest protector; I give them leg guards; I give them a mask; and a mitt.

Q Do you furnish this, also, to the Dixie Youth?

A Everybody, yes.

Q You do?

A Everybody that is in baseball; and softball, no.

Q In other words, to make it clear for the record, there is in Montgomery a baseball league for young boys seven to twelve years old, called "Dixie Youth Baseball League"?

A That is right.

Q And that is a predominantly white league, isn't it?

A Not altogether.

Q They have one or two black players in the league?

A That is right.

Q But it is a predominantly white league, isn't it?

A We don't have nothing controlling that part.

Q But answer my question; it is a predominantly white league?

A It is.

Q All right. And you furnish to this predominantly white league the same numbers of baseballs and chest protectors, and things, that you furnish to the black league?

A I give everybody one dozen balls and eight bats, and the chest protectors; I don't care how -- as long as they are in a league.

Q Now, who in your Department is kind of a coordinator or overseer of the Dixie Youth Baseball activities; is that yourself, or --

A (Interrupting) You mean, the coordinator of it?

Q Who from Dixie Youth League checks -- when they check with your Department, who do they check with?

A For their equipment?

Q Well, maintenance of their fields, equipment --

A (Interrupting) For maintenance, with the maintenance man, which is -- we have a maintenance man.

Q Who is that?

A Katt Wendling. But on the lights, they belong to me. If they call me and say, "We knocked out four lights tonight," or, "They fell out tonight," we have the Alabama Power Company, one of their foremen, which we hire, that we replace the bulbs.

Q And you pay the electricity bill for the lights at the Little League park?

A That is right. On all parks.

Q Babe Ruth and Little League parks?

A Softball and all.

Q Do you maintain the diamonds?

A The best we can. When you say "maintain", if they are going to play on them all day, we don't have a chance. Now, like some of these schools, you know, that morning, they start on it on PE early that morning, you play all day -- No, sir. But, now, on ones during the summer -- yes, sir.

Q I don't believe -- let's take Dannelly School, for example. I don't believe the PE is allowed to go down there and play on that Little League ball diamond, are they?

A If they are in the school -- well, I can't answer

that. I don't know. I am not for sure. Allowed to?

Q Uh-huh. They don't go there --

A (Interrupting) If it belongs to them, we can't keep them off.

Q As a matter of fact, you don't have a fence around it, so they can't get in there --

A (Interrupting) I hope there is a fence on all of them, to keep the bicycles off of there; horses off of there.

Q Now, I show you Plaintiffs' exhibit, marked No. 33, and ask if you can identify that?

. . . Witness examines document . . .

A That is one of the schedules that they sent me, is here.

Q You say "they", who is "they", now?

A This, right here, is what you call your West Belser League.

Q Belser Babe Ruth League?

A That is right.

Q And that is a white league?

A Well, it is -- if you want to call it that, yes; but they are mixed.

Q Now, the number of blacks playing is insignificant, now, isn't it?

A In other words, I don't have no idea on the color, how many of each, because I don't check on that.

Q But you think of this as a predominantly white league, don't you?

A Right; right.

Q All right. Now, Exhibit 34, I believe you have already identified as being your proposed 1970 basket ball schedule?

A Right.

Q And Exhibit 35, what is that?

A This, right here, is a schedule of the YMCA Civic Club softball.

Q All right. And that is for 1970?

A No, that was -- yes, sir.

Q All right. Now, that is predominantly white teams playing there, isn't it?

A Yes, sir.

Q I show you Plaintiffs' Exhibit 36?

A What are you asking me?

Q Just identify it; I am sorry, sir.

A Most of these are black.

Q I know it is black, but it is titled, "Goode Street Park, Girls'-Women's Program"?

A That is under a fellow called Sam Webb.

Q Out at Goode Street?

A That is right.

Q Is he black?

A That is right.

Q All right. And this is a schedule for what, now, for 1970?

A This is all their basket ball schedule.

Q All right. And Exhibit No. 37 is what?

A That is their boys. The reason I say "boys", there is boys and men.

Q And men. Now, the teams they are playing are in other areas outside of Goode Street, aren't they?

A That is right.

Q And this, again is black?

A Predominantly black.

Q Predominantly black. I show you Exhibit No. 38, and ask you to identify that?

. . . Witness examines document . . .

A This is still predominantly black.

Q Now, that is the Little League schedule, 1970?

A They call themselves "Little Leagues".

Q I see. It identifies down there, "YMCA" . Now,

what YMCA is that, Cleveland Branch?

A It could be. I am not sure of that, but I believe that is right.

Q All right. And that "Boys' Club", that would be the Capital City black Boys' Club?

A The new Boys' Club, is right.

Q The new one -- that is the black one?

A Yes, sir.

Q I show you Exhibit 39, and ask you to identify that?

A That is your Babe Ruth schedule, which W. L. Mills is your president -- commissioner.

Q I see. Now, what clubs does that involve -- now, this -- I believe this, here again, is a predominantly black Babe Ruth schedule?

A Right.

Q And you also have some church -- a Baptist church league for using City fields for playing on?

A That is right. Softball.

Q Softball?

A Uh-huh.

Q And I believe all of these churches are predominantly white churches -- in fact they all are white churches?

A That is right.

Q In fact, in all of these leagues, these baseball and softball leagues, that the City maintains the fields for and provides the lights for and furnishes the balls as you mentioned for, none of these teams involve play between predominantly black teams and predominantly black teams, do they?

A Well, if they ask to play each other, they can, on exhibition games, if they want to. That is left to them, just like all this scheduling.

Q That is all black teams playing black teams?

A If they want to. I am talking about white against black, if they want to, now.

Q I see. But as far as the practice is concerned, in the past, what has actually happened has been white teams playing white teams and black teams playing black teams, is that right?

A That is right.

Q I see. Now, do you have any responsibility in the area of the community centers?

A Just the fields.

Q The fields?

A That is right.

Q Did you have any responsibility as far as their athletic activities is concerned?

independent, you have got civic, you have got -- what else is it?

Q Are your fields open to softball participants, regardless of whether they be black folks or white folks?

A Anybody that wants to use them. Now, if there is a scheduled game already going on, I say, "No, it is filled tonight." I keep a chart, a great big chart, to tell me who is playing out there that night, in case somebody calls me and says, "Can I play out there at Goode Street, tonight?" I look on my little chart, and I say, "No, you can't play out there tonight; it is filled up. You can Thursday night, on whatever is vacant." Now, that is on all of them.

Now, out here at what you call the Boys' Club, Central Boys' Club, we built a field out there, this past year. The City built a softball field to be used any way they wanted to. And I asked them for a schedule, and I never did get one. I found out later that they had a league out there -- they told me to start with, I don't recall his name out there at that Club, I don't know his name -- three teams, and I was snowed under the rest of the time.

Q What I am getting to, those schedules are furnished to you by the folks who are playing?

A That is right.

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF ALABAMA

NORTHERN DIVISION

GEORGIA THERESA GILMORE,
et al,

Plaintiffs

vs

CIVIL ACTION
NO. 1490-N

CITY OF MONTGOMERY, ALABAMA,
et al,

Defendants

DEPOSITION OF MR. WILLIAM L. BRANNON, taken pursuant to notice and subpoena duces tecum, on behalf of the Plaintiffs in Room 207, United States Post Office and Court House Building, Montgomery, Alabama, before Christine Wilcox, Reporter and Notary Public for the State of Alabama at Large, on Thursday, September 17, 1970, commencing at 9:00 A.M.

APPEARANCES

MORRIS S. DEES, JR., Esq., and JOSEPH J. LEVIN, JR., Esq., Levin and Dees, 210 Washington Building,

Montgomery, Alabama; and

SOLOMON S. SEAY,JR., Esq., Gray, Seay and Langford
352 Dexter Avenue, Montgomery, Alabama, Attorneys
for the Plaintiffs.

JOSEPH D. PHELPS, Esq., Hill, Robison, Belser and Phelps,
36 South Perry Street, Montgomery, Alabama; and

WALTER J. KNABE, Esq., Capell, Howard, Knabe and Cobbs,
57 Adams Avenue, Montgomery, Alabama; and

DRAYTON N. HAMILTON, Esq., Hinson and Hamilton,
26 South Perry Street, Montgomery, Alabama,
Attorneys for the Defendants.

STIPULATION

It is stipulated and agreed by and between counsel representing the parties that the deposition of MR. WILLIAM L. BRANNON may be taken before Christine Wilcox, Reporter and Notary Public for the State of Alabama at Large, without the formality of a commission; and all formality with respect to other procedural requirements is waived; that objections to questions, other than objections as to the form of the question, need not be made at this time, but may be reserved for a ruling at such time as the deposition may be offered in evidence

examines same . . .

Q Mr. Brannon, are you employed by the Montgomery Recreation Board, the City Recreation Department?

A I am.

Q I see. How long have you been so employed?

A Since June 16, 1951.

Q In what capacity did you come to work for, in that Department?

A As a playground leader at Washington Park.

Q I see. Now, presently, as of today, what are your duties, not in the future, but right now, today?

A I consider myself a supervisor in the Recreation Department.

Q What are your duties; what do you actually do?

A I coordinate programs; Centers. I carry out the instructions of the Superintendent or Director of Recreation.

Q For the record, I would like for you to state that you are of the Negro race?

A I am a Negro.

Q All right. And where is your office?

A My office is located in the Carver Community Center.

Q Is Carver Community Center predominantly a Negro

Community Center?

A Yes, it is.

Q All right. Now, let's go back to your responsibilities. What do you do in your day-to-day work in terms of — which Community Centers do you work with, the Negro Community Centers or the white Community Centers?

A Well, my work is predominantly with the Negro Centers and playgrounds.

Q And what does that work consist of?

A It consists of checking on personnel, the areas, making systematic reports to the Department, Director of Personnel or the Athletic Supervisor. I feel that I am directly responsible to the Superintendent of Recreation.

Q Is that Mr. Andrews?

A Mr. Andrews.

Q Do you get your orders directly from him?

A Officially, yes.

Q Who is over you, unofficially?

A Unofficially — it is a chain of command. The Director of Personnel —

Q (Interrupting) Where are you in the chain of command?

A Beg your pardon?

Q Where are you in the chain of command?

A As a supervisor, I am related to the Director of Personnel, the —

Q (Interrupting) Who gives you your day-to-day orders about what to do in your job?

A Well, officially, it would come through the Director of Personnel.

Q But who actually tells you what to do?

A The Superintendent of Recreation.

Q Who is that?

A Mr. Henry Andrews.

Q I see. So, you have meetings with him, what, on a weekly basis, or something, to determine what your —

A (Interrupting) Well, periodically; it may come frequently or infrequently.

Q I see. All right, now, what do you do in relationship to the Negro playgrounds in the City, that you testified that you are responsible for?

A Mainly, check on personnel, the physical condition of the area, advise on programs.

Q I see —

A (Interrupting) I might say that I serve more or less,

I believe, in a consultant capacity.

Q Would you name the Negro Community Centers that you are responsible for?

A Houston Hill, Carver, and smaller ones, King Hill, Washington Park --

Q (Interrupting) Goode Street?

A Goode Street play area.

Q And what about the Negro playgrounds that you are responsible for?

A Well, playgrounds, as such; again, I would include Goode Street, Washington Park, King Hill.

Q I believe -- have any of your duties been related to baseball?

A Well, substantially, and particularly the summer programs.

Q Now, what does that consist of, that you are responsible for?

A It consists of organizing to the extent of bringing together a city-wide program for Little League and Babe Ruth age boys.

Q Little League and Babe Ruth age boys. Is that the name of your league, "Little League"?

A We call ourselves "Little League", and we call ourselves the "Babe Ruth" League.

Q Are you officially franchised by the Little League?

A No, we are not.

Q So, would it be an apt description to say it is just a system of organized baseball in Montgomery, that is under the direction of the Montgomery Recreation Department, for young people, with no connection with any national official baseball organization?

A I think that is fair.

MR. PHELPS: We are going to object to Mr. Dees leading the witness and testifying; and we think he should be asking the witness questions and not testifying.

MR. DEES: I don't want to lead him; I was just trying to save a little time. Because I don't really understand thoroughly, myself.

Q (Mr. Dees) Mr. Brannon, will you say, then, that you are not affiliated with any national Little League program?

A Yes, sir.

Q Now, does the City Recreation Department provide equipment for these Little League teams?

A It does.

Q Does it provide playing fields for them?

A It does.

Q Does it provide playing fields for the Babe Ruth teams?

A Yes, sir.

Q All right. Now, are the players on these teams — I might say this, are these Little League teams that you are responsible for, and Babe Ruth teams, predominantly Negro teams?

A Yes, they are.

Q I see. Are you familiar with the Dixie Youth baseball program in Montgomery?

A Casually so.

Q Well, do you know that this organization is young boys of comparable age of your Little League that play on City fields?

A Well, I do know that.

Q Are these predominantly white teams, these Dixie Youth Baseball Leagues?

A Well, they use the term when they say "predominantly", yes.

Q Now, do you know whether the City furnishes fields

for these players?

A As far as I know, the use their playing fields.

Q Do you know whether the City maintains these fields for them?

A I believe the City maintains all its fields.

(At this time, at the request of Mr. Dees, the Reporter marks documents, "Plfs' Ex 1"; "Plfs' Ex 2"; "Plfs' Ex 3"; "Plfs' Ex 4"; "Plfs' Ex 5"; "Plfs Ex 6"; "Plfs' Ex 7"; "Plfs' Ex 8"; "Plfs Ex 9"; "Plfs' Ex 10"; and "Plfs' Ex 11"; said exhibits are attached to the end of this deposition and made a part hereof.)

Q All right, now. I want to show you these exhibits, Plaintiffs' Exhibit 1, and ask if you can identify this?

. . . Witness examines document . . .

A Yes, this is a copy of a letter, upon request, outlining my duties and responsibilities as a supervisor.

Q This letter is from Mr. Murray Frederick, Assistant Superintendent of the --

A Right.

Q Now, to the best of your recollection, was this same procedure followed with the white Little Leagues, back before they were disbanded, with the exception of you being in charge of them?

A I must say, I would assume.

Q All right. Now, I show you Plaintiffs' Exhibits 5 and 6, and what is No. 5?

. . . Witness examines document . . .

A The Babe Ruth League, National League.

Q For what year is that?

A 1967.

Q That came out of your files; I believe you are responsible for that league, also?

A I am.

Q I see. And is that a black league?

A It is a black league.

Q All right. Now, let's look at Plaintiffs' Exhibit 6 and will you describe that?

A It is a 1967 copy of the Little League.

Q I see. So that is just a duplicate of the one you put in for 1970, except it is for an earlier year?

A So far as organization, it is, but you see, it is expanded over the years — in numbers of teams, I mean.

Q I show you exhibit 7.

. . . Witness examines document . . .

A This would be — rather, it is the Little League roster for an all-star game.

Q Now, what letterhead is that on?

A It is on the Cleveland Avenue Branch YMCA.

Q I see. Now, do you have any correspondence in your files from the South or Central or East or Southeast YMCA Branches?

A I have not.

Q None of these branches have contacted you concerning any athletic facilities, or athletic equipment, or teams, or games, have they?

A No.

Q But the Cleveland Branch has contacted you from time to time, concerning athletic programs?

A Well, yes, they have always participated in our summer league.

Q All right. That is summer baseball leagues?

A Summer baseball leagues.

Q Right. I show you Plaintiffs' Exhibit 8, and ask if you can identify this?

. . . Witness examines document . . .

A This is a submission from the Capital City Boys' Club of the allstar roster.

Q If the Capital City Boys' Club — I believe that is — yes, that is Kit Washington's organization — I mean, Kit Franklin's organization — is that the black Boys' Club?

A Yes, it is.

Q Now, have you had any correspondence from the Montgomery Boys' Club, the — I believe the white Boys' Club, have you had any correspondence from it, concerning any of your programs?

A No.

Q But from time to time, the Capital City Boys' Club has contacted you in relationship to coordinating recreational activities?

A Definitely; yes.

Q I show you Plaintiffs' Exhibit 9, and ask if you can identify this?

. . . Witness examines document . . .

A This is from the Dexter Avenue Baptist Church, who

participate in the summer baseball leagues. They submitted two team rosters, Little League and Babe Ruth.

Q Now, is this Dexter Avenue Baptist Church a black Baptist Church?

A Yes.

Q Do you have any submissions of teams from any white churches in Montgomery?

A No.

Q I see. Could you identify Plaintiffs' Exhibit No. 10?

. . . Witness examines document . . .

A The team roster of the Cleveland Avenue Branch of the YMCA Little League, 1969.

Q And would you identify Exhibit No. 11?

. . . Witness examines document . . .

A Again, a team roster from the Capital City Boys' Club.

Q And that is a different one from the previous one you showed me?

A Yes, it is. This would be a current year of either '65 or '67; they run substantially the same.

MR. DEES: No further questions.

baseball --

Q (Interrupting) Let's talk -- let's explain the difference, now; why is it different between baseball and football?

A Well, baseball, particularly, it is a summer program; it is a recreational program. And it was my duty -- I was requested, rather, to set it up on a city-wide basis. And then, we simply seek to get the widest possible participation. And as I said before, beginning in about 1962, I think, more or less, and it has grown substantially through the years, that it does not cover the greater Montgomery area. And it is a matter of solicitation.

But when it comes to football, as I see it, it is the school's competitive sport, and it grows out of the school's Physical Education program.

Q Well, let's go back to baseball for a minute. Have you received any instructions as to the racial structure of any baseball league?

A Well, none.

Q Does the league come to you or do you go to the league for organization?

A Well, it comes to me.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

GEORGIA THERESA GILMORE, ET AL.

PLAINTIFFS

VS.

CITY OF MONTGOMERY, ALABAMA, ET AL.

DEFENDANTS

CIVIL ACTION
NO. 1490-N

DEPOSITION OF MR. JOSEPH E. MARSHALL, TAKEN PURSUANT TO NOTICE AND SUBPOENA DUCES TECUM ON BEHALF OF THE PLAINTIFFS, IN ROOM 207, U. S. POST OFFICE AND COURT HOUSE BUILDING, MONTGOMERY, ALABAMA, BEFORE CHRISTINE WILCOX, REPORTER AND NOTARY PUBLIC FOR THE STATE OF ALABAMA AT LARGE, ON MONDAY, OCTOBER 19, 1970, COMMENCING AT 10:00 A.M.

APPEARANCES

MORRIS S. DEES, JR., Esq. AND JOSEPH J. LEVIN, JR., Esq., LEVIN AND DEES, 210 WASHINGTON BUILDING, MONTGOMERY, ALABAMA, ATTORNEYS FOR THE PLAINTIFFS.

JOSEPH D. PHELPS, Esq., HILL, ROBISON, BELSER AND PHELPS, 36 SOUTH PERRY STREET, MONTGOMERY, ALABAMA; AND ALSO

THERE IT IS TO ME, AS DISTRICT DIRECTOR, AND I HAVE BEEN STATE DIRECTOR FOR SIX YEARS NOW.

Q SO, THE MAP THAT WE WILL IDENTIFY AS AN EXHIBIT IN A MOMENT -- I JUST WANT TO ASK SOME GENERAL QUESTIONS ABOUT IT - THIS MAP YOU HAVE HANDED ME, HERE, IS A MAP OF THE DISTRICTS, OF THE GEOGRAPHIC AREA COVERED BY THE SEVEN --

A (INTERRUPTING) IT IS ACTUALLY NINE LEAGUES.

Q IN MONTGOMERY?

A YES, SIR.

Q NINE LEAGUES IN MONTGOMERY. AND THIS MAP SHOWS THE GEOGRAPHIC AREA FOR ONE, TWO, THREE, FOUR, FIVE, SIX, SEVEN --

A (INTERRUPTING) THERE SHOULD HAVE BEEN EIGHT AT THAT PARTICULAR TIME. THERE ARE TWO LEAGUES OPERATING IN THIS AREA (INDICATES) --

Q (INTERRUPTING) WHERE YOU HAVE GOT IT DESIGNATED "AMERICAN", THERE ARE TWO LEAGUES?

A YES. TWO LEAGUES MAY OPERATE IN THE SAME AREA, IF EVERYBODY IS GIVEN THE SAME OPPORTUNITY TO CHOOSE --

Q (INTERRUPTING) NOW, WHEN WAS THIS PARTICULAR MAP, HERE --

A (INTERRUPTING) I WOULD SAY, SIR, THAT THAT WOULD PROBABLY HAVE BEEN ABOUT 1964.

Q AND WHERE IS THERE A MORE CURRENT MAP?

A THEY DON'T UPDATE THIS THING UNLESS THERE IS A CHANGE IN THE BOUNDARIES. AND I HAVE NOT BEEN NOTIFIED OF A CHANGE. I SHOULD HAVE BEEN NOTIFIED ABOUT ANY CHANGES, IF THEY OCCURRED, BUT I ASSUME THERE HASN'T BEEN ANY.

MR. DEES: NOW, THIS EXHIBIT HERE, WE WILL MARK "PLAINTIFFS' EXHIBIT 51".

A AS YOU WELL KNOW, TWO LEAGUES OPERATE IN THIS AREA HERE, NOW (INDICATES).

Q OH, SO THIS IS THE COVERALL NOW?

A YES, SIR.

Q TWO OPERATING OUT OF THE AMERICAN AND TWO OUT OF THE SOUTHEASTERN?

A RIGHT.

(AT THIS TIME, THE REPORTER MARKS MAP, "PLFS' EX 51;" SAID EXHIBIT ACCOMPANIES THE ORIGINAL OF THIS DEPOSITION AND IS MADE A PART HEREOF.)

MR. HAMILTON: LET ME INTERRUPT. NINE LEAGUES, IS THAT WHAT WE HAVE NOW --

A (INTERRUPTING) YES, SIR.

MR. HAMILTON: (CONTINUING) -- IS THAT THE TESTIMONY?

MR. DEES: WE HAVE HAD REFERENCE HERE TO PLAINTIFFS'

EXHIBIT 51. MR. HARSHALL HAS FURNISHED US A COPY OF THE GEOGRAPHIC AREAS FOR THE NINE DIXIE YOUTH BASEBALL LEAGUES IN MONTGOMERY.

Q WHO DETERMINES THESE GEOGRAPHIC AREAS, MR. MARSHALL?

A THE LEAGUES, THEMSELVES. EACH LEAGUE DETERMINES ITS OWN BOUNDARY. AND THE LEAGUE IS COMPOSED OF VOLUNTEER WORKERS WHO FORM THE LEAGUE.

Q I UNDERSTAND. NOW, LET'S LOOK ON FURTHER, HERE, ITEM NO. 5: I BELIEVE YOU TOLD ME ON THE TELEPHONE THAT YOU DON'T HAVE THAT ITEM?

A NO, SIR, EACH LEAGUE FINANCES ITSELF, AND IT HAS NO OBLIGATION TO FURNISH ME WITH A STATEMENT.

Q AND ITEM NO. 6, A COPY OF THE 1970 LEAGUE OFFICIALS, DO YOU HAVE THAT?

A YES, SIR, I HAVE THAT. IF YOU WANT TO KEEP IT, SIR, I WILL HAVE TO GET IT OUT OF THIS BOOK AND LEAVE IT WITH YOU. I WOULD LIKE IT BACK, BECAUSE THIS IS MY ONLY COPY.

Q WELL, WE CAN DO IT ONE OF TWO WAYS. WE WILL MARK THIS "LEAGUE OFFICIALS" AS PLAINTIFFS' EXHIBIT 52, AND IF YOU COULD JUST FURNISH ME WITH A XEROX OF EACH OF THOSE SHEETS, OR I WILL BE GLAD TO XEROX IT AND HAND THEM ALL BACK OVER TO YOU, EITHER WAY.

A WELL, YOU DO IT, BECAUSE I DON'T HAVE THE FACILITIES.

BASEBALL LEAGUE SIXTEEN YEARS?

A APPROXIMATELY THAT; NOW, NOT ALL IN DIXIE YOUTH. WE WERE FORMERLY THE LITTLE LEAGUE ORGANIZATION. BUT WE HAVE BEEN IN DIXIE YOUTH -- DIXIE YOUTH GIVES MORE LOCAL CONTROL TO THE PROGRAM. IN OTHER WORDS, THEY LET EACH UNIT DETERMINE THEIR SCHEDULE. WE HAVE DOUBLE ELIMINATION TOURNAMENTS WHICH PROVIDE MORE PLAY FOR THE YOUNGSTERS.

Q NOW, WHEN DID MONTGOMERY GET ITS FIRST DIXIE YOUTH BASEBALL FRANCHISE?

A I WOULD SAY IT WAS PROBABLY ABOUT '62 OR '63; I DON'T REMEMBER EXACTLY.

Q AND PRIOR TO THAT, YOU WERE CONNECTED WITH IT UNDER THE NAME OF "LITTLE LEAGUE"?

A YES, SIR. I WAS THE PRESIDENT OF A LEAGUE AT THAT TIME.

Q IN MONTGOMERY?

A YES, SIR.

Q NOW, WASN'T ONE OF THE CONSIDERATIONS, BACK IN 1962, IN SWITCHING FROM LITTLE LEAGUE TO DIXIE YOUTH BASEBALL, THE FACT THAT THE NATIONAL LITTLE LEAGUE REQUIRED INTEGRATION OF THE TEAMS; WASN'T THAT ONE OF THE CONSIDERATIONS?

A IT WASN'T SO FAR AS I WAS CONCERNED. THE PRIMARY REASON THAT I WAS INTERESTED IN WAS THE DOUBLE ELIMINATION

MR. DEES: LET'S MARK THIS AS PLAINTIFFS' EXHIBIT No. 54.

Q THIS IS A SAMPLE TYPE LETTER, THEN, THAT YOU USE TO GO TO THE SCHOOLS?

A YES, SIR. AND IT IS GIVEN TO EVERY BOY IN SCHOOL. I DON'T THINK WE COULD PUT ONE IN A SCHOOL AND SAY, "GIVE IT OUT TO A CERTAIN YOUNGSTER." MAY I FINISH WHAT I WAS SAYING A MINUTE AGO ABOUT THE FACT, THERE AT ONE TIME, WE DID HAVE SOME INFORMATION IN HERE CONCERNING RACE. WE -- KNOWING THAT WE PLAY -- A GREAT NUMBER OF OUR LEAGUES PLAY ON CITY PROPERTY, WE KNEW THAT WE MUST NOT EXCLUDE ANY BOY, REGARDLESS OF HIS RACE, ORIGIN, CREED OR COLOR. SO, WE WITHDREW THIS IN ORDER THAT OUR LEAGUES, WHICH DID DEPEND ON MUNICIPAL FUNDS, COULD CONTINUE TO OPERATE. AND I WOULD SAY, IN THE STATE OF ALABAMA, RIGHT NOW, THERE MUST BE AT LEAST FORTY OR FIFTY LEAGUES THAT HAVE COLORED BOYS -- NOT ONE OR TWO, BUT A GOODLY NUMBER. AND THERE ARE TWO ALL-COLORED LEAGUES IN THE STATE OF SOUTH CAROLINA. THEY HAVE NOTHING BUT COLORED BALL PLAYERS; THEY ENTER TOURNAMENTS WITH OUR WHITE, PREDOMINANLY WHITE LEAGUES, AND THERE HAVE BEEN NO DIFFICULTIES THAT I KNOW OF. AND I ANTICIPATE THIS, PROBABLY THIS YEAR, IN ALABAMA, TO BE THE CASE. AND NONE HAVE APPLIED. IF THEY APPLY, I AM SURE THEY WILL BE GRANTED A FRANCHISE. WE KNOW THAT.

than I do to letter carrying. This might put me in the category of being a "nut".

Q Mr. Marshall, does the City of Montgomery have any control, whatsoever, over the formation or composition of a Dixie Youth League?

A No, sir, they don't. The only control that they could have, possibly, would be the use of a ball park. They provide these Leagues with a place to play. And it -- as I said, we have two Leagues that are -- two areas that are divided in two Leagues. They have to schedule these games, in order that both of them won't show up the same night. That is all.

Q Does the City of Montgomery have any agreement with Dixie Youth Baseball to the effect that a segregated baseball league would be maintained?

A No, sir. The only correspondence that I have ever seen, that came out of the City to the Leagues, was a memorandum last year, that says that, "You must cut the lights off by ten-fifteen." That is all.

Q Mr. Marshall, has the City directly or indirectly encouraged segregated baseball leagues, in connection with Dixie League Baseball?

A No, sir, not to my knowledge, they haven't.

Q AND I BELIEVE YOU SAID THAT THE LEAGUES WERE FORMED ON A POPULATION BASIS?

A YES, SIR.

Q WILL YOU ELABORATE A LITTLE BIT ON THAT, PLEASE, FOR THE COURT?

A WELL, TO BEGIN WITH, IF WE ALLOWED THE CITY OF MONTGOMERY TO OPERATE ONE DIXIE YOUTH BASEBALL LEAGUE, YOU CAN WELL IMAGINE THAT THIS LEAGUE HERE WOULD PROBABLY DOMINATE PLAYING THE WHOLE STATE. CERTAINLY, THE CITY OF PRATTVILLE WOULD NOT HAVE A FAIR OPPORTUNITY IN PLAY WITH THE CITY OF MONTGOMERY.

SO, WE LIMIT EACH LEAGUE TO A MAXIMUM OF FIFTEEN THOUSAND PEOPLE, PER LEAGUE. WE FEEL LIKE ANY LEAGUE SHOULD OPERATE -- SHOULD HAVE ENOUGH BOYS TO PLAY, IN THAT AMOUNT OF POPULATION.

I MIGHT POINT OUT, THE CITY OF PRATTVILLE, GROWING, HAS RECENTLY HAD TO GO TO TWO LEAGUES. NOW, NEEDLESS TO SAY, I DON'T GO COUNT PEOPLE ALL THE TIME, BECAUSE LIKE I SAID, I DON'T HAVE TIME TO DO THAT.

Q THIS FIFTEEN THOUSAND POPULATION, IS THAT A GEOGRAPHIC -- WORKED OUT ON A GEOGRAPHIC BOUNDRY?

A YES, SIR. NORMALLY SPEAKING, IT IS WORKED OUT ACCORDING TO THE SCHOOL BOUNDARIES, BECAUSE THIS IS THE EASIEST

WAY TO DO IT. FOR INSTANCE, IF WE HAD TWO LEAGUES, PART OF THEIR PLAYERS GOING TO THE SAME SCHOOL, IT WOULD CREATE A GREAT DEAL OF CONFUSION. THESE KIDS WOULDN'T KNOW WHERE TO GO TO PLAY. SO, WE TRY TO -- IN OTHER WORDS, ALL KIDS THAT GO TO CLOVERDALE WOULD GO TO A CERTAIN LEAGUE.

Q WELL, IN COMPUTING THAT FIFTEEN THOUSAND POPULATION, DO YOU COUNT BLACK PEOPLE AS WELL AS WHITE PEOPLE?

A YES, SIR. ANY PERSON THAT LIVES WITHIN THAT AREA.

Q NOW, HOW WOULD I GO ABOUT -- OR LET'S SAY MR. DEES AND I HAD PUT TOGETHER SIX TEAMS FOR A LEAGUE, AND THREE OF THOSE TEAMS WERE BLACK, PREDOMINANTLY BLACK, AND THREE OF THEM WERE PREDOMINANTLY WHITE, BECAUSE OF THE AREAS IN WHICH THEY CAME FROM, LET'S SAY; HOW WOULD WE GO ABOUT GETTING A FRANCHISE WITH DIXIE LEAGUE?

A FIRST OF ALL, YOU WOULD HAVE TO DETERMINE WHETHER THE AREA THAT YOU WANT TO OPERATE IN IS ALREADY THE AREA OF AN ESTABLISHED LEAGUE. NOW, IF THIS AREA IS WITH AN ESTABLISHED LEAGUE, YOU WOULD GO TO THAT LEAGUE AND SAY, "LISTEN, WE HAVE GOT SIX TEAMS OVER HERE, AND WE WANT OUR OWN LEAGUE. SO, THEY COULD, OR WOULDN'T NECESSARILY HAVE TO, GIVE YOU PERMISSION. ONCE YOU DID GET THE PERMISSION, THOUGH, YOU WOULD APPLY TO DIXIE YOUTH BASEBALL FOR A FRANCHISE. AND THAT FRANCHISE, PROVIDED YOU PAID YOUR FEES, AND PROVIDED YOU AGREED TO PLAY

BY OUR RULES, WOULD BE GRANTED. WE WOULD BE HAPPY TO GRANT IT.

Q IS IT YOUR TESTIMONY THAT AN INTEGRATED LEAGUE, SUCH AS I OUTLINED, WOULD, IN FACT, BE GRANTED A FRANCHISE --

A (INTERRUPTING) YES, SIR.

Q (CONTINUING) -- BY DIXIE YOUTH BASEBALL?

A I WOULD HAVE NO KNOWLEDGE OF WHAT COLOR THESE BOYS ARE, BECAUSE OUR APPLICATION HAS NO REFERENCE TO COLOR, WHATSOEVER.

Q DO YOU, OR DO THE REPRESENTATIVES OF DIXIE YOUTH BASEBALL, GO TO THESE PEOPLE OR DO THE PEOPLE COME TO YOU?

A THEY COME TO US.

Q EXPLAIN THE MECHANICS OF THAT, AS FAR AS SOLICITATION OF ADDITIONAL LEAGUES, HOW THAT WORKS.

A WELL, TO BEGIN WITH, AS I SAID, I AM A VOLUNTEER IN THE PROGRAM, AND WITH EACH ADDITIONAL LEAGUE MEANS ADDITIONAL WORK, AS FAR AS I AM CONCERNED. BUT FOR THAT REASON, I DON'T HAVE TIME, OR MAYBE THE ENERGY, TO GO OUT AND RECRUIT LEAGUES. BUT IF A LEAGUE IS INTERESTED IN BEING FORMED, THEY SIMPLY WRITE ME AND SAY, "WE WOULD LIKE THE FRANCHISE," AND I CHECK THEIR TERRITORY TO SEE IF THEY ARE NOT OPERATING WITHIN THE BOUNDARIES OF ANOTHER LEAGUE, ALREADY, AND THEN WE GRANT THEM THE FRANCHISE. I PUT MY PERSONAL ENDORSEMENT ON THE APPLICATION.

Q I BELIEVE THE FRANCHISE FEE, ACCORDING TO PLAINTIFFS' EXHIBIT NO. 52, IS THIRTY-SIX DOLLARS?

A IT IS SIX DOLLARS PER TEAM. NOW, OUR LEAGUES VARY FOUR, FIVE AND SIX TEAMS; IT IS SIX DOLLARS PER LEAGUE.

Q ALL RIGHT. AND IS THERE ANYTHING OTHER, FINANCIALLY, THAT THESE LEAGUES MUST DO?

A THERE IS A STATE FEE, THERE, OF TWELVE FIFTY. NOW, THIS FEE GOES TO HELP ME IN MY EXPENSES, BECAUSE I DO A GREAT DEAL OF MAILING; I DO A GREAT DEAL OF PHONING DURING THE BASEBALL SEASON; AND OCCASIONALLY, I AM INVITED TO COME TO A CIVIL CLUB TO SPEAK, OR I AM INVITED TO GO TO MOBILE TO A -- FUNCTION THERE. AND THAT IS HOW THIS MONEY IS SPENT.

Q DO THE LEAGUES HAVE TO FURNISH INSURANCE FOR THE TEAMS?

A THEY INSURE THEIR OWN BOYS.

Q IS THAT A REQUIREMENT?

A NOT REALLY, BUT IT IS CERTAINLY ENCOURAGED, BECAUSE, AS YOU KNOW, ONE INJURY CAN -- WITHOUT INSURANCE, IT IS ROUGH ON PARENTS, SO WE ALMOST MAKE IT MANDATORY THAT THEY CARRY SOME TYPE OF INSURANCE.

Q NOW, IN YOUR POSITION AS STATE COMMISSIONER --

A (INTERRUPTING) STATE DIRECTOR.

Q STATE DIRECTOR -- DO YOU KNOW WHETHER, IN FACT, BLACK BOYS DO PARTICIPATE IN DIXIE YOUTH BASEBALL, NOT ONLY IN MONTGOMERY, BUT THROUGHOUT THE STATE OF ALABAMA?

A YES, SIR. I WOULD SAY MOST OF OUR LEAGUES PLAY ON SOME MUNICIPAL PARK, EITHER -- IF IT IS NOT THEIR PARK, THE LIGHTS ARE FURNISHED BY THE CITY. THAT IS THE EXTENT OF THE CITY'S PART IN OUR PROGRAM IN MONTGOMERY, IS THE FACT THAT, SO FAR AS I KNOW, THEY OWN THE LAND ON WHICH WE PLAY. THEY DETERMINE AND DO A CERTAIN AMOUNT OF MAINTENANCE ON THAT FACILITY, AND THE LAST THING IS THAT THEY PAY THE LIGHT BILL. ANYTHING OTHER THAN THAT, OUR LOCAL LEAGUES DO THROUGH THEIR OWN FINANCING, WHICH IS GENERALLY OPERATING THE CONCESSION STAND, OR HAVING A BARBECUE, OR SOMETHING LIKE THAT.

Q THE CITY JUST PROVIDES THE LEAGUE WITH A PLACE TO PLAY?

A THAT IS RIGHT. IT IS A HAPPY RELATIONSHIP, SO FAR AS OUR LEAGUES ARE CONCERNED, BECAUSE THIS IS A REAL BOOST, JUST THE PAYING OF THE LIGHT BILL.

Q IN THIS BROCHURE THAT MR. DEES HAS INTRODUCED AS PLAINTIFFS' EXHIBIT 53, YOU SAID THESE WERE THE ALLSTAR TEAMS FOR LAST YEAR?

A YES, SIR.

Q I BELIEVE ON YOUR ALLSTAR TEAMS, YOU DID HAVE REPRESENTATION BY SOME BLACK PARTICIPANTS?

A YES, SIR.

Q THAT WOULDN'T MEAN THAT YOU HAD ONLY BLACK PARTICIP

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

GEORGIA THERESA GILMORE, ET AL.,

PLAINTIFFS

vs.

CITY OF MONTGOMERY, ALABAMA, ET AL.,

DEFENDANTS

CIVIL ACTION
NO. 1490-N

DEPOSITION OF MR. ALLYN McKEEN,

TAKEN PURSUANT TO NOTICE AND SUBPOENA DUCES TECUM ON BEHALF OF THE PLAINTIFFS, IN ROOM 207, U. S. POST OFFICE AND COURT HOUSE BUILDING, MONTGOMERY, ALABAMA, BEFORE CHRISTINE WILCOX, REPORTER AND NOTARY PUBLIC FOR THE STATE OF ALABAMA AT LARGE, ON MONDAY, OCTOBER 19, 1970, COMMENCING AT 10:45 A.M.

APPEARANCES

HORRIS S. DEES, JR., ESQ. AND JOSEPH J. LEVIN, JR., ESQ., LEVIN AND DEES, 210 WASHINGTON BUILDING, MONTGOMERY, ALABAMA, ATTORNEYS FOR THE PLAINTIFFS.

JOSEPH D. PHELPS, ESQ., HILL, ROBISON, BELSER AND PHELPS, 36 SOUTH PERRY STREET, MONTGOMERY, ALABAMA; AND ALSO

MR. ALLYN McKEEN, OF LAWFUL AGE, HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

BY MR. DEES:

Q I BELIEVE YOU ARE MR. ALLYN McKEEN?

A THAT IS RIGHT.

Q SPELLED A-L-L-Y-N?

A THAT IS CORRECT.

Q ALL RIGHT. MR. McKEEN, YOU HAVE BEEN EXPLAINED, PRIOR TO BEGINNING THIS DEPOSITION, THE RIGHT FOR YOU TO SIGN THIS DEPOSITION. DO YOU WAIVE THAT RIGHT OF SIGNATURE?

A I DO.

Q MR. McKEEN WHAT IS YOUR ADDRESS IN MONTGOMERY, ALABAMA.

A YOU MEAN MY HOME ADDRESS?

Q YES, SIR.

A 3221 MASTIN LANE.

Q AND I BELIEVE YOU ARE ASSOCIATED WITH McKEEN AND WILSON SPORTING GOODS COMPANY?

A THAT IS CORRECT.

Q MR. McKEEN, ARE YOU CONNECTED WITH THE BABE RUTH LEAGUE OF MONTGOMERY?

A I AM.

Q WHAT IS THE NAME OF THAT ORGANIZATION?

A THAT IS IT. IT IS JUST THE BABE RUTH LEAGUE. AND WE HAVE A CITYWIDE ORGANIZATION OF THE VARIOUS LEAGUES. AND THEN YOU HAVE FOUR LEAGUES THAT HAVE INDIVIDUAL NAMES.

Q NOW, WHAT IS YOUR CAPACITY IN THIS ORGANIZATION?

A WELL, IT IS ABOUT NINETY-EIGHT PERCENT HONORARY. I AM COMMISSIONER OF THE BABE RUTH LEAGUES IN MONTGOMERY.

Q WHAT IS THE OFFICIAL NAME OF THE ORGANIZATION IN MONTGOMERY?

A JUST THE BABE RUTH LEAGUES OF MONTGOMERY, CITY ORGANIZATION.

Q AND DO YOU HAVE A BOARD OF DIRECTORS --

A (INTERRUPTING) NO, SIR.

Q (CONTINUING) -- OF THE CITYWIDE ORGANIZATION?

A NO, SIR.

Q NOW, WHAT --

A (INTERRUPTING) THERE ARE ONLY TWO -- LET ME INTERRUPT THERE. THERE ARE ONLY TWO OFFICERS OF THE CITYWIDE MONTGOMERY BABE RUTH LEAGUE, AND THAT IS MYSELF, AS COMMISSIONER, AND J. B. MCCASLIN, AS SECRETARY, AND WE HAVE ONE MEETING A YEAR. AND THAT IS IT.

Q I SEE. NOW, WHAT ARE THE NAMES OF THE LEAGUES THAT

LEAGUES THAN I DO.

Q IS THERE ANY RULE, AT EITHER THE STATE OR THE DISTRICT OR THE LOCAL LEVEL, AGAINST BLACK CHILDREN PARTICIPATING IN BABE RUTH BASEBALL?

A TO THE BEST OF MY KNOWLEDGE, THERE IS NONE, WHATSOEVER.

Q IS IT YOUR UNDERSTANDING THAT BLACK BOYS DID, IN FACT, PARTICIPATE HERE IN MONTGOMERY, DURING THE 1970 BASEBALL SEASON?

A IT IS MY UNDERSTANDING, BUT FROM MY ACTUAL KNOWLEDGE, I DO NOT KNOW.

Q HOW MANY TEAMS DO WE HAVE IN MONTGOMERY -- OR HOW MANY TEAMS OF BABE RUTH ARE IN EXISTENCE IN MONTGOMERY?

A I AM NOT SURE I CAN TELL YOU. THERE ARE FROM FOUR TO SIX TEAMS IN EACH LEAGUE.

Q AND WE ONLY HAVE FOUR LEAGUES, AS YOU HAVE OUTLINED?

A THAT IS CORRECT.

Q HOW WOULD YOU GO ABOUT GETTING A FRANCHISE FOR BABE RUTH BASEBALL?

A WELL, YOU WOULD HAVE TO MAKE AN APPLICATION TO THE STATE ORGANIZATION. ALL BABE RUTH LEAGUE TEAMS IN THE STATE OF ALABAMA ARE FRANCHISED FROM THE STATE ORGANIZATION, NOT FROM THE NATIONAL. THERE COULD NOT BE ONE FRANCHISED IN THE CITY OF MONTGOMERY, OTHER THAN THOSE WE HAVE, BECAUSE ALL OF THE AREA

IS NOW TAKEN UP BY EXISTING LEAGUES.

Q COULD AN ADDITIONAL TEAM ENTER INTO THE LEAGUES THAT WE HAVE HERE NOW?

A A TEAM COULD MAKE AN APPLICATION TO THE LEAGUE FOR ADMITTANCE. THE ONLY THING THAT MIGHT PREVENT THEIR BEING ADMITTED WOULD BE THAT IF THEY DID NOT HAVE SUFFICIENT TIME TO SCHEDULE THE GAMES -- IN OTHER WORDS, THIS IS WHAT I AM GETTING AT.

A FIELD CAN ACCOMODATE ONLY SO MANY TEAMS. IF THEY ALREADY HAVE SIX TEAMS PLAYING, THEY PROBABLY COULD NOT COME IN AS A NEW TEAM. THEY WOULD HAVE TO APPLY TO ONE OF THE EXISTING TEAMS. IF THEY HAD LESS THAN SIX TEAMS, IT IS PROBABLE THAT THEY COULD COME IN AS A TEAM. BUT THAT WOULD BE UP TO THE INDIVIDUAL LEAGUE.

Q THERE ARE DIVISIONS, I BELIEVE, WITHIN THESE VARIOUS LEAGUES, AREN'T THERE?

A OH, YES -- WELL, NO, NOT NOW. BY DIVISIONS, THERE WERE, BUT IN THE GRAY LEAGUE THERE WERE TWO DIVISIONS, BUT THEY ARE NOW TWO SEPARATE LEAGUES.

Q WELL, NOW, IF MR. DEES AND I HAD A TEAM WITH SIX BLACK BOYS AND THREE WHITE BOYS ON IT, WOULD THAT TEAM -- IT COULD BE SCHEDULE TIMEWISE AND GEOGRAPHIC-WISE, WOULD THAT TEAM BE FRANCHISED, AS FAR AS YOU KNOW?

Track at Black Carver High School

U. S. DIST. COURT - MIDDLE DIST. - ALA.

PLAINTIFF'S EXH 112

U. S. DIST. COURT - MIDDLE DIST. - ALA.
PLAINTIFF'S EXH 110

Drinking Facilities at Black Park

[redacted]

U. S. DIST. COURT - MIDDLE DIST. - ALA.

PLAINTIFF'S EXH 127

U. S. DIST. COURT - MIDDLE DIST. - ALA.

PLAINTIFF'S EXH 105

Ala'45

[redacted] Recreation Center

Inter Park League -- National League

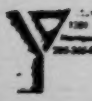
Monday & Wednesday

Date	Teams	Time	Date	Teams	Time
June 17			July 19		
Carver Vs. Bob Cat		6 p.m.	Boy Club vs. Bob Cat		6 p.m.
Holtom Park Vs. Boy Club		8 p.m.	Carver vs. Holtom Park		8 p.m.
June 21			July 21		
Boy Club vs. Bob Cat		6 p.m.	Carver vs. Boy Club		6 p.m.
Carver vs. Holtom Park		8 p.m.	Bob Cat vs. Holtom		8 p.m.
June 26			July 26		
Carver vs. Boy Club		6 p.m.	Holtom Park vs. Boy Club		6 p.m.
Bob Cat vs. Holtom Park		8 p.m.	Bob Cat vs. Carver		8 p.m.
June 28			July 31		
Holtom Park vs. Boy Club		6 p.m.	Carver vs. Holtom Park		6 p.m.
Bob Cat vs. Carver		8 p.m.	Bob Cat vs. Boy Club		8 p.m.
July 13			August 2		
Carver vs. Holtom Park		6 p.m.	Bob Cat vs. Holtom Park		6 p.m.
Bob Cat vs. Boy Club		8 p.m.	Boy Club vs. Carver		8 p.m.
July 12			August 9, 10, 11		
Bob Cat vs. Holtom Park		6 p.m.	Play off		
Boy Club vs. Carver		8 p.m.	Top 3 teams, both League		
July 17					
Carver vs. Bob Cat		6 p.m.			
Holtom Park vs. Boy Club		8 p.m.			

U. S. DIST. COURT - MIDDLE DIST. - ALA

PLAINTIFF'S EXH 5

Oct 6 '64 7



BOARD OF MANAGEMENT
[illegible]

LITTLE LEAGUE ALLSTARS NOTES

1. Carver---G
2. Gibbs Village---SS
3. Gibbs Village---C
4. St. Jude---3b
5. Boys Club---Little
6. St. Jude---SS
7. Boys Club---2b
8. Carver---3b

YMCA
John Howard,
Coach

[illegible]

U. S. DIST. COURT - MIDDLE DIST. - ALA.
PLAINTIFF'S EXH 7

Clyde Key 8

[illegible] Richardson
President
L. L. Gordon
Vice-President
Mrs. Kaye Franklin
Secretary
Asbury E. Ashby
Treasurer
Dave Bradford
Chairman of Finance

CAPITAL CITY BOYS' CLUB, Inc.

2000 Boys' Club Road
MONTGOMERY, ALABAMA 36108
WILLIAM FRANKLIN, Executive Director
Phone 265-1101

DIRECTORS
James Bell
Jerome E. Bloch, Jr.
P. M. Blue
Dave Bradford
Wilson Bristow
Cleveland Brown
T. W. Campbell
Harvey de Tavenne
Jack Eley
Ellis Ford
John H. Ford
Mrs. Kaye Franklin
L. L. Gordon
Johnnie Graham
Richard Grant
Bobby Jackson
Hunter Johnson
Dr. Hiram W. Jones
Willie Jones
Atty. Charles D. Langford
Charlie Perkins
Edward Pressley
Mrs. Kenny Pressley
Garbett Richardson
Franklin Riley
James Shirley
Mrs. Emma Scott
Herbert T. Sorrowy
Mrs. Katie Spiva
H. O. Thompson
Mrs. Lucile Tinus

LITTLE LEAGUE ALL STAR BASE POSITION	CHARLES JOHNSON TEAM
1. Elm....C	Carver
2. R. Mills.....2B	Gibbs Village
3. Terrence.....SS	Y.M.C.A.
4 C. Hill.....3B	Gibbs Village
5. G. Phillip...L.F.	Gibbs Village
6. Hargroves....1.B	St. Jude
7. R. Dickerson..R.F.	Carver
8. R. Wilshow....C.F.	Gibbs Village

"AN INVESTMENT IN BOYS PAYS DIVIDENDS"

U. S. DIST. COURT - MIDDLE DIST. - ALA.

PLAINTIFF'S EXH. 8

Pltf's Exh 9

Dexter Avenue Baptist Church

To : Mr. William Brennon
From: Robert N. Williams
In Re:Baseball teams

Two or three of the deacons of the Dexter Avenue Baptist Church advised me to turn in the following names to participate in the City's Recreational Baseball Program this summer. Please be reminded that the Deacon Board nor the Congregation have given their approval of this action yet, however,I feel reasonable sure that they will not favorable.

Listed below are the tentative names under the division in-which they will play:

LITTLE LEAGUE

1. Edward Wood
2. Gregory Brown
3. Willie Stringer
4. William Gary
5. Louis Grayson
6. James Warren
7. Cedric Jordan
8. William Minter
9. Bryon Bragg
10. Alexander Townsend
11. James Townsend
12. [illegible]
13. Michael Davis
14. [illegible]
15. [illegible]
16. Vandiver ?
17. Bryant ?

BABY RUTH LEAGUE

1. Richard Williams
2. Stanley Sanders
3. Reginald Sanders
4. Paul Brenne
5. Arthur Stringer
6. James Moore
7. Jefferson Underwood
8. Duron Dandy
9. Eric James
10. Charles Scott
11. Stanley Daniel
12. Junior Simpson
13. Martin Taylor

Now Mr. Brennon I feel sure that I will be able to get a couple more boys for the Baby Ruth Division, I am also making an effort to get birth certificates.

U. S. DIST. COURT - MIDDLE DIST. - ALA.

PLAINTIFF'S EXH 9

Atty's Ex 10

CLEVELAND AGGIES MIDGET TYKE LITTLE LEAGUE ROSTER 1969

	NAME	AGE	ADDRESS	BIRTH DATE
1.	Ronald Abrams	12	[redacted]	
2.	Willie G. Abre	12	1610 Aaron Street	12/5/57
3.	Johnny Boswell	12	510 Liberty Street	8/5/56
4.	Glenn Caffey			
5.	Wayne Carter	11	346 Troy Street	6/2/57
6.	Ronnie Davis	12	313 Wade Street	7/3/56
7.	Kenneth Fields	12	316 Troy Street	3/3/57
8.	Gary Henderson	11	1113 Aaron Street	1/5/57
9.	Willie London	12	323 Troy Street	2/27/57
10.	Arthur Johnson	12		
11.	Ray Prowitt	11	Virginia Avenue	11/8/57
12.	Willie A. Stallworth	12	409 Underwood Street	5/19/57
13.	Freddie Mason	12		12/27/56
14.	Dwight Stenson	12		8/25/56
15.	Willie Earle	12	340 Lake Street	10/5/56
15.				
17.				
18.				
19.				
20.				

L. C. Whitstone (Jan: 9-1-69) —— 3/— Playing Date

John Eddie Howard, Coach

Robert E. Jones, Physical Director

U. S. DIST. COURT - MIDDLE DIST. - ALA.

PLAINTIFF'S EXH 10

Plfs' Ex 19

RESOLUTION

WHEREAS, the City of Montgomery, Alabama, upon the abandonment of the City Infirmary, about the year 1910, took possession of and has retained open and notorious possession, since that time, of the following described property:

> Beginning at a point on the east side of South Perry Street, said point being 466' south of the southeast corner of South Perry and South Street, thence south along the east side of South Perry Street 147' to the northeast corner of South Perry Street and Jefferson Davis Avenue (formerly Winnie Street), thence east along the north side of Jefferson Davis Avenue 305' to the northwest corner of Jefferson Davis Avenue and South Lawrence Street, thence north along the west side of South Lawrence Street 96' to a point, said point being 515.6' south of the southwest corner of South and South Lawrence Street, thence west 151', thence north 50', thence west 153' more or less to the point of beginning, being that property formerly known as the City Infirmary Property; and,

WHEREAS, after taking possession of the hereinabove described property, a public park was developed and operated by the City of Montgomery thereon and the property has remained a park since that time; and,

WHEREAS, after the creation and organization of the Park and Recreation Board of the City of Montgomery, Alabama, the City of Montgomery, while retaining its claim to the property, transferred the operation and maintenance of the park, located thereon, to the said Board; and,

WHEREAS, on January 1, 1959, the said park was closed to the public and has not been reopened to the public since that date; now, therefore,

> BE IT RESOLVED that the transfer of operational control and maintenance over said property to the Park and Recreation Board be and the same is hereby revoked and that the land be and the same is hereby freed of any and all control by the said Park and Recreation Board; and,

WHEREAS, it is now determined by the Board of Commissioners that the said property is not needed further as a public park and is not needed for any public or municipal purposes or purpose; now, therefore,

> BE IT FURTHER RESOLVED that the said land shall cease to be used for park and recreational purposes and the same is declared to be excess property and not needed for public or municipal purposes.

U. S. DIST. COURT - MIDDLE DIST. - ALA.

PLAINTIFF'S EXH 19

AN ORDINANCE No. 7-61

WHEREAS, the property hereinafter described and known as Perry Street Park or City Infirmary Property, has, by resolution this day passed by the Board of Commissioners of the City of Montgomery, Alabama, been released from the operation, control and maintenance of the Parks and Recreation Board of the City of Montgomery, Alabama; and,

WHEREAS, the Board of Commissioners is of the opinion that said property is no longer needed as a public park in the City of Montgomery, Alabama, or for any other public or municipal purposes. Now, therefore,

BE IT ORDAINED BY THE BOARD OF COMMISSIONERS OF THE CITY OF MONTGOMERY, ALABAMA, AS FOLLOWS:

1. That that certain public park, heretofore known as Perry Street Park or City Infirmary Property, the property of which park is located in the City and County of Montgomery, Alabama, and is described as follows:

Beginning at a point on the east side of South Perry Street, said point being 466' south of the southeast corner of South Perry and South Streets, thence south along the east side of South Perry Street 147' to the northeast corner of South Perry Street and Jefferson Davis Avenue (formerly Winnie Street), thence east along the north side of Jefferson Davis Avenue 305' to the northwest corner of Jefferson Davis Avenue and South Lawrence Street, thence north along the west side of South Lawrence Street 96' to a point, said point being 515.6' south of the southwest corner of South and South Lawrence Streets, thence west 151', thence north 50', thence west 153' more or less to the point of beginning, being that property formerly known as the City Infirmary Property;

be and the same is hereby declared to be no longer a City Park in the City of Montgomery, Alabama, and is no longer needed for any other public or municipal purposes; and,

WHEREAS, the Board of Commissioners has determined that the value of said property is Eighteen Thousand ($18,000.00) Dollars, and the said Board has received an offer from the Young Men's Christian Association of Montgomery, Alabama, to purchase said property at and for said price, said property to be devoted to the use of the said Young Men's Christian Association of Montgomery, Alabama, in the construction and operation of an athletic, health, and recreational and religious facility.

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PLAINTIFF'S EXH 19 (p. 2)

Now, therefore,

BE IT FURTHER ORDAINED BY THE BOARD OF COMMISSIONERS OF THE CITY OF MONTGOMERY, ALABAMA, AS FOLLOWS:

2. That the offer of the Young Men's Christian Association of Montgomery, Alabama, to purchase the property formerly operated as Perry Street Park be and the same is hereby accepted and that the President of the Board of Commissioners be and he is hereby directed to execute on behalf of the City of Montgomery, Alabama, a deed conveying the following described property, located in the City and County of Montgomery, State of Alabama, to the said Young Men's Christian Association of Montgomery, Alabama, viz:

Beginning at a point on the east side of South Perry Street, said point being 466' south of the southeast corner of South Perry and South Streets, thence south along the east side of South Perry Street 147' to the northeast corner of South Perry Street and Jefferson Davis Avenue (formerly Winnie Street), thence east along the north side of Jefferson Davis Avenue 305' to the northwest corner of Jefferson Davis Avenue and South Lawrence Street 96' to a point, said point being 515.6' south of the southwest corner of South and South Lawrence Streets, thence west 121', thence north 50', thence west 153' more or less to the point of beginning, being that property formerly known as the City Infirmary Property;

upon the terms and conditions set forth in a deed, a copy of which is attached hereto and made a part hereof, and to deliver said deed upon the receipt of Eighteen Thousand ($18,000.00) Dollars.

3. This ordinance shall take effect as provided by law, after passage, approval and publication.

Published - ala - Journal
February 18, 1961

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PLAINTIFF'S EXH 19 (p. 2)

MLK 46-22

BOARD OF DIRECTORS

November 8, 1965

[illegible]

Roll Call and Minutes

[illegible] with a accepted our invitation to Board membership but already had a commitment for today.

Report on Tillie Walker

Joel is out with an infected foot following the removal of a toe nail.

1. Financial Report . . . . . Charles Kohn
2. Building Fund Collections . . . . . Gus Dozier
3. United Appeal Report and Request . . . . Frank McGough
4. City Recreation Report . . . . . Mayor Earl James
5. "Y" Camp Report . . . . . Dr. Robert Parker
6. Boys Work Project. . . . . Monk Kohn
7. Cleveland Avenue Report . . . . . Bill Gordy
8. World Service Report . . . . . Bill Gordy
9. Personnel Report . . . . . Minnie Truett
10. Southeast Property . . . . . Bob Steiner

U. S. DIST. COURT - MIDDLE DIST. - ALA.

PLAINTIFF'S EXH 22

Plfs' Ex 28

MINUTES
MONTGOMERY Y.M.C.A. BOARD OF DIRECTORS MEETING

March 2, 1956

The Board members were the guest of the President, Mr. Carl Bear, at a dinner meeting at the Governor's House Motel.

The meeting was opened with prayer by Mr. Tom Jones and the following members were present:

D. F. Arant	Fred Hardy	A. B. McFerrin
Max Baum	Mayor Earl James	Frank McGough
Carl Bear	Earle D. Kitchen	John Neill
Winton Blount	Dave Larson	Dr. Robert Parker
John Borden	Duncan Liles	James Pruett
Fletcher Childs	Bill Lyerly	Don M. Smith
Gus Dozier	Ray Marshall	Rush Stallings
Dr. Paul Everest	Oakley Melton	C. Ed. Teague
Bill Gordy	Howard McElhaney	Adolph Weil, Jr.
W. Tom Jones	Bill Chandler	Streeter Wiatt

Mr. Blount gave the report of the Long Range Study Committee, copy of which is attached to these minutes. Items 1, 2 and 3 were presented but did not call for action by the Board. Attention was called to the new regulation proposed for government agencies related to the United Appeal.

Mr. Baum moved that the recommendations on Endowments, Bequests be adopted. The motion was seconded by Mr. McGough and unanimously passed. These recommendations are listed below:

1. A program for bequests through the Trust Department of the Banks and the Attornies.

2. A direct contact with each Board and Branch Board member to ask him to include the Y.M.C.A. in his will.

3. A current endowment program. At present we have received 5% of the income each year from the Smith Trust at the First National Bank and the Prattville Branch receives income from the sale of property that has been placed in endowment and from the Smith Trust.

Mr. Blount reviewed the capital accounts of the Montgomery Y.M.C.A. and suggested that the pledges in arrears should not be considered as true assets. He reported that the projected improvements of the Central Branch should produce 300 new members and an income of $12,500 per year. The increased cost should not exceed $6500; thus providing $6000 new dollars per year for operation. Mr. Blount moved that the Board accept the recommendations of the Committee to borrow up to $100,000 for the following needs.

Immediate Needs	
1. Addition to Central Branch	$67,500.00
2. Repairs - South	13,000.00
3. Repairs - East	11,500.00
4. Repairs - Cleveland Avenue	2,500.00
5. Negro Camp Site	5,000.00
	$99,500.00

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PLAINTIFF'S EXH 23

Further that the Board approve a capital fund drive not to exceed $750,000 to be conducted in 1968 concurrent with the 100th birthday of the Montgomery Y.M.C.A. This motion was seconded by Mr. Liles with knowledge that a full study would be made of each of the proposed items. Unanimously passed.

Mr. Blount then presented to the Board an addendum to the Committee's recommendations pertinent to a facility in the Chisholm community. A discussion followed in which Mr. Jones emphasized the value of the coordinated efforts of the city and the Y.M.C.A. and the possibility of a combined effort in this area. The President appointed a committee of Mr. Steiner, Mr. Arnat, Mr. Teague and Mr. Lyerly to investigate this need.

Mr. Watt emphasized the importance of a continued maintenance program after the South and East "Y"s were brought back up.

Mr. Jones moved that the Endowment Committee begin work immediately and that the members suggested by the Long Range Study Committee be asked to serve on this Committee. The motion was seconded by Mr. McElhaney unanimously passed. Mr. Max Bunn was asked to serve as temporary chairman.

Mr. Larson stated that he felt that the Chisholm program would be a vital asset to our capital fund endeavor and suggested that it be included. He reported on the Sustaining Membership Drive and asked each Board member complete his contacts as soon as possible.

A discussion followed in regard to the subsidy funds needed for the facilities approved in the Long Range Report and the General Secretary was asked to make a thorough study and report on this item.

The President announced that Mr. Cordy and the General Secretary would attend the Area Council meeting in Atlanta Friday and Saturday, March 4th & 5th.

Submitted by:

WILLIAM C. CHANDLER
GENERAL SECRETARY

WCC/ab
enclosure

U. S. DIST. COURT - MIDDLE DIST. - ALA.
PLAINTIFF'S EXH 23 (D.2)

Plfs' Exh 24

TO: PARKS AND RECREATION BOARD
ALL PARK AND RECREATION DEPARTMENT PERSONNEL
COMMUNITY CENTER BOARD CHAIRMEN
Y.M.C.A. PERSONNEL
Y.M.C.A. BRANCH CHAIRMEN

Gentlemen:

In an effort to improve our services to the youth of our city a special committee composed of members of the Boards of the Park and Recreation Department and the Y.M.C.A. and the key staff from each organization have made a study of areas of service. It is our hope that we can reach boys and girls in the finest program in the South and with the minimum of duplication of effort.

To this end I am asking that you meet with Mr. Florian Streetwagon, Chairman of the Board of the Park and Recreation Department; Mr. Carl Bear, President of the Y.M.C.A.; and me on Tuesday afternoon, November 9th, to review this study and to consider implementation thereof. The meeting will be held at the Recreation Office, Oak Park Pavilion at 5:15 p. m.

Thank you.

Sincerely,

Earl D. Jones, Mayor
City of Montgomery

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PLAINTIFF'S EXH 24

Y.M.C.A.

Carl W. Bear	Bear Brothers
Dave Larsen	DeShields-Larsen, Normandale
Rush Stallings	Rush Stallings
George Monroe	Monroe Cardinal Hospital
Ike Groce Parkman	Ashley
Walter Tyson	Smith & Tyson
John Barnett	South Y.M.C.A.
Jim Raiha	East Y.M.C.A.
Bob Pike	South Y.M.C.A.
Ted Cason	East Y.M.C.A.
Noel Smith	Central Y.M.C.A.
Bonnie Floyd	Central Y.M.C.A.

* * * * *

I suggest that we do not include the Negro staff members or Board members.

Frantz Wilson	Cleveland Avenue
W. E. Thompson	Carver High School

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PLAINTIFF'S EXH 24(P.2)

Pltf's Ex 49

MINUTES OF MEETING
PARKS AND RECREATION BOARD
November 13, 1958

The meeting was called to order at 2:30 by the chairman. The following members were present: Mrs. James Pitts Hill, Chairman; Mr. Frank Hope, Rev. Louis Armstrong; Father Malcolm Rafferty; and Mr. F. A. Dirgsburger. The meeting was opened with prayer by Father Rafferty.

MINUTES OF MEETINGS -- The minutes of the Board meeting held on October 21, 1958, were read. It was suggested that in the future the discussion be omitted from the minutes, and that only the motions made and actions taken be recorded.

BUDGET REPORT -- Copies of the budget report for October were distributed. All items appear to be within the budget except the garage account.

SHOWER CURTAINS AND HI-FI RECORD PLAYERS -- The Board was advised that the hi-fi record players have been ordered and should be delivered next week. The shower curtains have been installed in the community centers.

TENNIS COURTS -- The matter of new tennis courts was discussed again. A motion was made, seconded and carried that the tennis courts be considered again in January.

CARVER COMMUNITY CENTER -- It was brought out that the city has not yet installed a street light in the front of this building. A motion was made, seconded and carried that this matter be called to the attention of the traffic and lighting engineer, and that he be requested to install a street light at this location.

YMCA -- Mr. Hope reported on a meeting with representatives of the YMCA. Copies of a proposed agreement, as prepared by Mr. Rex Lane, were distributed to Board members, along with a separate sheet with a recommended change in Item 7 of the agreement. A motion was made, seconded and carried that this proposed agreement, with the suggested amendment in Item 7, be accepted, provided the proposed amendment is approved by the YMCA.

JUNIOR HIGH SCHOOL FOOTBALL PROGRAM -- The junior high school football program was discussed briefly. A motion was made, seconded and carried that a definite decision be made in January on whether or not to continue this program.

PERSONNEL FOR THE GLOVERDALE COMMUNITY CENTER -- Mr. Baker stated that this building will probably be turned over to the Department in a short time, and plans are being made to secure the personnel needed for this center. Mr. Baker stated that he had talked with Mrs. Nancy Stubbs, who was formerly at Ballingrath, and that she would be available for Gloverdale. No objection was offered to the employment of Mrs. Stubbs. Mr. Andrews told the Board that he has received a list of eligible people from the Personnel Department, and is contacting those people in regard to part time jobs at the Gloverdale Center.

RULE PROHIBITING SCHOOL AGE CHILDREN FROM ACTIVITIES IN THE CENTER AFTER 7:00 P.M. -- Mr. Frederick told the Board that he had received a request from some one who desired to hold an invitational basketball tournament. This person would like to have this rule set aside so that the tournament could be played off in a week, which would necessitate the use of the Center at night during the week by school children. After discussion a motion was made, seconded and carried that our rule in regard to school night activities be strictly adhered to.

At this point the Board went into executive session.

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DEFENDANT'S EXH. 49

Offer 24 27

MONTGOMERY RECREATION DEPARTMENT - Y.M.C.A. COORDINATION COMMITTEE

OBJECTIVES

The objectives of the Coordination Committee will be to coordinate the programs of the Montgomery Recreation Department and Y.M.C.A. in order to provide the maximum recreation program to the people of Montgomery with a minimum overlapping of these services offered, to supplement the work of each other and to make plans to reach those who are not reached in the more popular program areas; to eliminate the pressures of more than one agency vying for the same participant in any of our recreation programs.

MEMBERSHIP

The committee shall be composed of three members of the Recreation Board and three members of the Y.M.C.A. Board. The Mayor, Recreation Superintendent and Y.M.C.A. General Secretary shall be ex-officio.

MEETING

The committee shall meet annually at a time close to the beginning of the school year to review this agreement.

A meeting of the Board Chairman and Staff of each Y.M.C.A. and Community Center will be held annually to review the agreement and propose improvements.

Special meetings of the committee can be called by the Chairman of the Recreation Board and the Y.M.C.A. President.

Areas to be covered in the agreement:

1. Athletics - Football, Basketball, Softball, Baseball, Track and Swimming.
2. Club Programs.
3. Coordination of programs in the Community Centers and Y.M.C.A.'s located in the same area.
4. Informal Education - Ceramics, Art, Bridge, etc.

ATHLETICS

FOOTBALL:

Fields are to be maintained by the Montgomery Recreation Department. On elementary school fields used by the Y.M.C.A. the initial cutting of lines will be done by the Recreation Department. The weekly application of marble dust will be the Y.M.C.A.'s responsibility. The junior high school fields will be maintained and lined by the Recreation Department. The first assignment of junior high school fields will be to the junior high varsity, then to the junior high junior varsity ("B"), and then to the Y.M.C.A.

The Y.M.C.A. will submit an attendance report to the Recreation Department for all activities that are played on the Recreation Department fields and for all programs that are conducted on a cooperative basis. Such reports will be submitted at the close of each season.

The Y.M.C.A. coach and staff members will visit with the playground director prior to each season to clear times and areas for practice and play.

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PLAINTIFF'S EXH 27

[illegible] Junior High League - Regulations set by Alabama High [illegible]

[illegible] Junior High "B" League - Boys in the 7th and 8th grades of junior high school who are not ready for senior high varsity.

[illegible] years old with weight restrictions by age.

Y.M.C.A. - Pre-[illegible] and Boys - 7-10 years old with weight restrictions by age.

The Y.M.C.A. leagues are designed for the elementary age boy and a limited number of the smaller boys who are too small for junior high "B" teams. Any weight changes for 7th graders must be made by the Coordination Committee.

BASKETBALL:

Recreation Department - Junior high school varsity and junior varsity ("B") teams and leagues and "C" teams (who may play Y.M.C.A. league).

Y.M.C.A. - Elementary age leagues.

Recreation Department or Y.M.C.A. - Senior high school boys not playing for high school varsity - "B" teams and men may choose the league(s) they play in. High school boys will not be eligible to play in more than two regularly scheduled games per week; this includes Recreation Department, church, Y.M.C.A. or other.

Boys not playing for elementary or junior high school teams may play in a league in a Community Center or Branch Y.M.C.A.

The Y.M.C.A. director will complete the organization of the elementary age leagues by the first week-end in December and will provide the appropriate community center director with a list of players. Community Center promotion will start no earlier than the Monday following the first week-end in December, and community center leagues will be formed for those boys not playing on the YMCA elementary age teams. The Y.M.C.A. leagues and teams involving junior high school boys will be organized after the community center junior high school program has been set. Boys may not play Y.M.C.A. and junior high school basketball.

All boys will be directed and encouraged to participate in the leagues under the supervision of the Recreation Department in junior high school whose abilities are in keeping with the Recreation Department program, and all elementary boys will be encouraged to play in the Y.M.C.A. leagues.

Churches and other groups forming leagues will comply with the above rules before using the Recreation Department or Y.M.C.A. facilities.

The Recreation Department and the Y.M.C.A. will schedule their own gymnasium activities for their own programs. After the Y.M.C.A. and the Recreation Department have completed their scheduling of the gymnasiums, if space is available, each will be given the opportunity to schedule activities in the community center buildings or the Y.M.C.A. buildings.

BASEBALL:

All baseball programs are directly under the supervision of the Recreation Department.

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PLAINTIFF'S EXH 27 (p. 2)

[illegible]

All swimming programs are the responsibility of the Y.M.C.A.

[illegible]

All men's, church and girls' leagues are directly under the supervision of the Recreation Department.

Y.M.C.A. - Civic Club Softball is under joint sponsorship. The Y.M.C.A. will provide administration and supervision, the Recreation Department will provide facilities.

[illegible]

All junior high school track is under the administration and supervision of the Recreation Department.

The Y.M.C.A. will conduct elementary track during the month of April to be completed the first week end of May. The Recreation Department is responsible for elementary track beginning in May and continuing through the summer.

CLUB PROGRAMS

The Y.M.C.A. and community centers located in the same school and neighborhood areas will exchange their club meeting schedule to avoid conflicts. Every effort will be made to avoid conflicts in scheduling Tri-Hi-Y meetings and girls' athletic programs.

COMMUNITY CENTER - Y.M.C.A.

A committee of one member of the Community Center Council and one member of the Branch Y.M.C.A. Board will be appointed when the community center and Y.M.C.A. operate in the same school district to coordinate the program efforts.

The Floyd Community Center and the South Y.M.C.A. should coordinate their program to avoid duplication of effort.

INFORMAL EDUCATION

Informal education classes should be planned by the community center director and the Y.M.C.A. executive so as to avoid any conflict or duplication of these classes.

November 8, 1949

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PLAINTIFF'S EXH 29 (p.3)

Defs Ex 28

MINUTES OF MEETING
PARKS AND RECREATION BOARD
November 10, 1959

The meeting was called to order at 2:30 P.M. by the Chairman. The following Board members were present: Mrs. James Pitts Hill, Chairman; Mr. Florian Strassburger, Vice-Chairman; Father Malcolm Rafferty and Mr. Jack Hope. The meeting was opened with prayer by Father Rafferty.

BUDGET — There was a brief discussion of the budget for the new program year. It was brought out that the amount for program is the same as for 1958-1959, and that the money which was formerly spent for junior high school football equipment is being used for other programs. Mr. Balser stated that arrangements are being made to dispose of the zoo animals, and that the amount saved in the zoo food account will be left in the budget and can be used for capital outlay.

Mr. Balser read a letter from Mr. C. R. Wood, the director of recreation of Durham, North Carolina, which stated that he will visit this department on a tour of several southeastern and southwestern cities. A motion was made, seconded and carried that a dinner or luncheon meeting be arranged during his visit, so that the Board might be able to go over some mutual problems with Mr. Wood.

MEETING WITH MAYOR NOVEMBER 9 — Mr. Balser reported on the meeting of recreation leaders and center directors with the mayor on November 9. This meeting was called by the mayor with the Board's permission. The purpose of the meeting was to talk over our mutual problems, and ways of expanding the program. The mayor requested rigid economy, and stated that he hoped to get the salaries in this department and other departments up to a better standard. Mr. Balser stated that it was a very refreshing and helpful meeting, and had a stabilizing effect on the employees. After discussion, a motion was made, seconded and carried that the commissioners be notified of the Board's meetings in the future.

OVERTIME — Mr. Balser stated that there would be no overtime for any department, and we have been asked to work our schedule so that overtime will not be required, as it is felt that the overtime has been abused. The status of the park attendants has not been settled.

MEETING WITH YMCA — Mayor Jones has requested that Mr. Hope, Mr. Strassburger and members of our staff and representatives of the YMCA meet in the mayor's office at the earliest possible date to review the agreement made with the YMCA in regard to a coordinated program. It is felt that both this department and the YMCA can operate basketball programs on Saturdays without conflicting with each other. A motion was made, seconded and carried that Mr. Frederick contact representatives of the YMCA and arrange the meeting with the mayor.

SALARIES — Mr. Balser stated that it is proving increasingly difficult to employ qualified recreation leaders at the salary rate now in effect. After discussion, a motion was made, seconded and carried that a recommendation be made that the salary for recreation leader I begin at $250.00 per month, to correspond with that for policemen and firemen.

RIFFLE PARK — There was a discussion of a recommendation to give this property to the Boys Club. Mr. Balser stated that the city attorney and the attorney for the Boys Club are working on the legal angles; however, no decision can be made until the attorneys have finished and made their recommendations.

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PLAINTIFF'S EXH 28

Orig. Ex 29

MONTGOMERY AREA BOARD OF DIRECTORS
FEBRUARY 10, 1969

The opening prayer was given by Mr. Franklin Parker. The minutes were approved as mailed on motion by Mr. Mailpern and second by Mr. McFerrin.

The following members were present:

D. F. Arant	T. O. McDowell
Max Boom	Howard McElheney
Carl W. Boer	A. B. McFerrin
Brightwell, Charles	Frank McGough
Dozier, C. A.	Earl Nix
Everest, Dr. Paul	Franklin Parker
James Gaskell	Dr. Robert Parker
W. J. Gordy	James G. Pruett
Fred Hardy	Don M. Smith
Bobby Mailpern	C. W. Teague
Earle D. Kitchen	John Thompson
Charles Kohn	F. L. Tittle
David L. Larson	Wyatt Shorter
Bill Lyerly	Al Sinclair
Arthur Mead	James Robinson
Oakley Melton	William G. Chandler

Life Member : The President read a letter from Postmaster General Red Blount accepting with pleasure, his election to Life membership.

New Member : Mr. Pruett introduced Mr. James Robinson as a new member of the Board to serve until March of 1971.

Nominating Committee : The President appointed the following Nominating Committee to serve for Board members and Board officers and to report at the March meeting: Charles Brightwell, Chairman; Dr. Robert Parker, T..O. McDowell, Fred Hardy, Arthur Mead and Bobby Mailpern.

Campaign Report : Dr. Parker gave the Campaign Report in the absence of Mr. Gaskell who arrived at the end of this report: To date we have exceeded our goals in the Special Gifts group. Southeast, Central and Prattville expect to reach their quota by the next report meeting and East is planning to extend the drive to reach the goal. Reported to date: $299,000.00

Financial Report : Mr. Brightwell gave the Financial Report and a copy is attached to these minutes. He explained that the report was good, but the most meaningful months in membership income were in May, June and July and the early months did not always hold up.

There is not a Building Fund Report this month.

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EXHIBIT NO. 29

Central Parking Lot : Mr. Tittle requested that the Board approve an appropriation of $6500.00 in advance from the funds to be alloted for the Central "Y" for the immediate construction of a parking lot. The motion was seconded by Mr. Kahn and unanimously passed.

Bart Starr : Mr. Gaskall moved that a resolution be drafted and sent to Bart Starr in appreciation of speaking at the Campaign Kick-Off Banquet. The motion was seconded by Mr. Kershaw and passed unanimously. The President reported that Bart would not accept any compensation for his travel expense or time stating that this was his contribution to the "Y".

Cleveland Avenue : Mr. Kitchen reported that the Cleveland Avenue "Y" had been contacted by the Mayor and requested to submit a proposal for the operation of three pools to be built by the Housing Authority and turned over to the City for operation. The YMCA would have full responsibility for the operation and the cost of the operation would be borne by the City. No action was required.

Campaign : Mr. Gaskall expressed his thanks to the Board for the outstanding work in the Campaign.

Ray Marshall : The President instructed the Secretary to send an appropriate resolution to the family of Ray Marshall who served as a member of the Board for several years and was the first Chairman of the Prattville Branch.

William G. Chandler

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PLAINTIFF'S EXH 29 (p.2)

Orig Cy 30

February 19, 1969

Mayor Earl James
City of Montgomery
Montgomery, Alabama

Dear Earl:

Enclosed are four (4) copies of our proposal for the operation of the pools that are being considered by the Housing Authority and the City of Montgomery. I trust that they will be clear.

At your convenience, I will be glad to meet to discuss the implementation of the proposals.

We are pleased to be a part of this worthwhile program and you will note that the "Y" Staff is making the organizational arrangements as a part of our community responsibility and service. We look forward to the opportunity of serving a larger portion of our population and feel that this contact will lead to other worthwhile programs which will be meaningful to the "Y" and the City, and most important, to the youth who participate.

Thank you.

Sincerely,

William C. Chandler
General Secretary

WCC:eel

Enclosure

cc: Mr. Henry A. Spears
Mr. Don Camp

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PLAINTIFF'S EXH 30

Proposal for Pool Operation by the Cleveland Avenue YMCA

Pool Construction:
1. To be the responsibility of the Housing Authority.
2. Provision made for daytime operation only.
3. Proposed size will be a 30 X 60 foot pool with adequate depth for a 1 meter diving board and minimum depth in shallow end of 36 inches.
4. Pool deck to be 10 feet wide on three sides and 15 feet on diving end.
5. Deck to include adequate drains.
6. Pool drains to recirculate to provide for minimum water usage.

Undetermined Items in Construction:

1. Type of Filter - a strong recommendation for a Sand and Gravel Filter System to offset maintenance and operational cost as well as provide clearer water.
2. Type chlorinator - a strong recommendation for a Gas Chlorinator for best operation. Also type of chlorinator housing - this is required.
3. Fence - height and protective features.
4. Night lighting system.

Special Equipment Required: SAFETY: (For each pool)

1. High Chair for Guard
2. Ring Buoy and Hook
3. Water Depth Markers on deck around pool
4. Vacuum Cleaner
5. Testing Kit
6. Filter Housing. This is not required by law, but an open filter can be tampered with during the closed hours and cause considerable expense and time.
7. Outdoor shower head with drain to wash off excess dirt prior to entering pool since shower house will not be available.
8. First Aid Kit.
9. Telephone System for emergencies
10. Dividing rope from shallow and deep end.

Special Equipment: PROGRAM

1. Pool Instructor Office, or desk with umbrella
2. Clip Boards and Whistles
3. Life Guard Hats and Dark Glasses
4. Life Guard Uniforms
5. Lane Markers
6. Racing Blocks
7. Recreational equipment such as balls, goals, etc.

Maintenance: Responsibility of the City.
1. Check gauges weekly or as called by Head Life Guard.
2. Check pumps for maintenance and operation.
3. All repairs
4. Chlorinator operation
5. All expenses related to maintenance and operation

Pool Proposal to City

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PLAINTIFF'S EXH 30 (p. 2)

Proposal for Pool Operation by the Cleveland Avenue YMCA
Page 2

Maintenance Operational Cost:

1. Utilities - Water - $600 per pool
   Power - $225 " "
2. Chlorine and other chemicals - $650 " "
3. Repairs (our average $300 per year)

Pool Operation: Responsibility of the YMCA Staff

1. Test the water three (3) times daily. Close pool when fails to meet minimum Health Dept. requirements and call City Maintenance.
2. Check gauges daily and backwash as needed.
3. Vacuum the pool as needed.
4. Make minor adjustment to chlorinator to meet conditions of the sun and weather.
5. Contact City Maintenance for any major operational problems.

Pool Supervision: YMCA Staff Responsibility

Staff Proposed:

Henry A. Spoore, Executive of the Cleveland Avenue YMCA and Robert James, Physical Director of the Cleveland Avenue YMCA and Don Camp, Assistant General Secretary of the YMCA.

Other staff to be employed based on three (3) pools.

1 Supervisor
4 Senior Life Guards to work 43 hours per week. Minimum qualifications - Leader Examiner Course completed, 20 years of age or one year college completed.
6 Junior Guards @ 40 hours per week. This will allow 2 life Guards at all hours and 3 during 3 peak hours daily. Qualifications - Senior Life Saving Course: 16 years of age.

Training: The YMCA will offer special courses in Life Saving and Leader Examiner during the month of May for all potential Guards.

Hours Open: 9:00 A. M. to 12:30 noon and 2:00 P. M. to 8:30 P. M. daily and 2:00 P. M. to 5:00 P. M. on Sundays. (43 hours per week)
May 27 - September 2 - 14 weeks

Supervision Costs:

Supervisor - $400.00 monthly	$1,400.00
4 Senior Life Guards - 43 hours per week @ $72.00 x 14 weeks x 4	4,064.00
6 Jr. Guards @ $1.00 per hour - 40 hrs. week x 14 weeks	3,360.00
Special Security	422.00
	$9,246.00

Pool Program to City Gym Mgr.

Continued

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PLAINTIFF'S EXH 30 (p.3)

...for Pool Operation by the Cleveland Avenue YMCA

Page ...

...Privileges:
1. To offer special classes prior to 10:00 A. M.
2. To organize community clubs, swim teams, etc.

...submits this proposal without a request for compensation for its professional staff and skills. We feel that this is a needed community service and pleased to be privileged to be a part.

proposal from YMCA to City p. 3

U. S. DIST. COURT - MIDDLE DIST. - ALA.
PLAINTIFF'S EXH 30 (p. 4)

Pltf Ex 32

BABE RUTH GRAY LEAGUE 1970 SCHEDULE

Friday May 8	6:00 8:15	Tom Green vs Alabama National Bank W. S. Newell vs Frosty Morn
Saturday May 9	6:00 8:15	Deep South vs W. S. Newell Ala. National Bank vs Frosty Morn
Friday May 15	6:00 8:15	Frosty Morn vs Tom Green Deep South vs Ala. National Bank
Saturday May 16	6:00 8:15	W. S. Newell vs Tom Green Frosty Morn vs Deep South
Friday May 22	6:00 8:15	Ala. National Bank vs W. S. Newell Tom Green vs Deep South
Saturday May 23	6:00 8:15	Frosty Morn vs W. S. Newell Ala. National Bank vs Tom Green
Friday May 29	6:00 8:15	W. S. Newell vs Deep South Frosty Morn vs Ala. National Bank
Saturday May 30	6:00 8:15	Tom Green vs Frosty Morn Ala. National Bank vs Deep South
Tuesday June 2	6:00 8:15	Tom Green vs W. S. Newell Deep South vs Frosty Morn
Thursday June 4	6:00 8:15	W. S. Newell vs Ala. National Bank Deep South vs Tom Green
Tuesday June 9	6:00 8:15	Tom Green vs Ala. National Bank W. S. Newell vs Frosty Morn
Thursday June 11	6:00 8:15	Deep South vs W. S. Newell Ala. National Bank vs Frosty Morn

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PLAINTIFF'S EXH 32

Tuesday June 16	6:00 8:15	Frosty Horn vs Tom Green Deep South vs Ala. National Bank
Thursday June 18	6:00 8:15	W. S. Newell vs Tom Green Frosty Horn vs Deep South
Tuesday June 23	6:00 8:15	Ala. National Bank vs W. S. Newell Tom Green vs Deep South
Thursday June 25	6:00 8:15	Frosty Horn vs W. S. Newell Ala. National Bank vs Tom Green
Tuesday June 30	6:00 8:15	W. S. Newell vs Deep South Frosty Horn vs Ala. National Bank
Thursday July 2	6:00 8:15	Tom Green vs Frosty Horn Ala. National Bank vs Deep South
Tuesday July 7	6:00 8:15	Tom Green vs W. S. Newell Deep South vs Frosty Horn
Thursday July 9	6:00 8:15	W. S. Newell vs Ala. National Bank Deep South vs Tom Green

TEAM LISTED ABOVE IS HOME AND WILL TRIED BASE ON OUT

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PLAINTIFF'S EXH 32 (p.2)

Def Ex 39

1. Barbers Hilk	1. Bell Street
2. Dexter Ave.	2. Boys Club
3. Houston Hill	3. Carver Community
4. Sheridan Heights	4. Globe Village
5. Trenhola Court	5. St. Jude
6. Vineyard	6. Washington P.
	7. Cleveland Court

SCHEDULE

St. Jude	(1) VS.	Washington P.
Trenhola C.	(2) VS.	Vineyard
Houston Hill	(3) VS.	Sheridan Heights

June 3,1970

Boys Club	(1) VS.	Cleveland C.
Carver C.	(2) VS.	Washington P.
Globe V.	(3) VS.	St. Jude

Sat. June 6,1970

Barbers Hilk	(1) VS.	Vineyard
Dexter Ave.	(2) VS.	Sheridan H.

June 8,1970

Houston H.	(3) VS.	Trenhola C.
Bell St.	(2) VS.	Carver C.
Gibbs V.	(1) VS.	Washington P.

June 10,1970

Dexter Ave.	(2) VS.	Houston H.
St. Jude	(1) VS.	Cleveland C.
Barbers Hilk	(3) Vs.	Trenhola C.

Sat. June 13,1970

St. Jude	(1) VS.	Bell St.
Sheridan H.	(2) VS.	Vineyard

June 15, 1970

Barbers H.	(2) VS.	Sheridan H.
Boys Club	(1) VS.	Globe V.
Washington P.	(3) VS.	Cleveland C.

June 17,1970

Dexter Ave.	(3) VS.	Trenhola C.
Houston H.	(1) VS.	Vineyard
Bell S.	(2) VS.	Cleveland C.

Sat. June 20,1970

Boys Club	(1) VS.	Washington P.
Carver C.	(2) VS.	St. Jude

June 22,1970

Bell St.	(2) VS.	Washington P.
Barbers H.	(3) Vs.	Houston H.
Gibbs V.	(1) VS.	Cleveland C.

June 24, 1970

Dexter A.	(2) VS.	Vineyard
Carver C.	(1) VS.	Boys C.
Sheridan H.	(3) VS.	Trenhola C.

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PLAINTIFF'S EXH 39

Mon. June 29,1970

Bell St.	(2)	VS.	Gibbs V.
Boys Club	(1)	VS.	St. Jude
Houston H.	(2)	VS.	Cleveland C.

July 1,1970

Bell St.	(2)	VS.	Boys C.
Barbers H.	(3)	VS.	Dexter Ave.
Carver C.	(1)	VS.	Gibbs V.

Sat. July 4,1970

Boys Club	1)	VS.	Cleveland C.
Carver C.	(2)	VS.	Washington P.

July 6,1970

Barbers H.	(2)	VS.	Vineyard
Gibbs V.	(1)	VS.	St. Jude
Dexter A.	(3)	VS.	Sheridan H.

July 8,1970

Houston H.	(2)	VS.	Freedom C.
Bell St.	(3)	VS.	Carver C.
Gibbs V.	(1)	VS.	Washington P.

Sat. July 11,1970

Dexter Ave	(1)	VS.	Houston H.
St. Jude	(2)	VS.	Cleveland C.
Barbers H.	(3)	VS.	Freedom C.

Mon. July 13, 1970

St. Jude	(1)	VS.	Bell St.
Sheridan H.	(2)	VS.	Vineyard
Boys Club	(3)	VS.	Gibbs V.

July 15,1970

Washington P.	(1)	VS.	Cleveland C.
Barbers H.	(3)	VS.	Sheridan H.
Dexter A.	(2)	VS.	Freedom C.

Sat. July 18,1970

Houston H.	(1)	VS.	Vineyard
Bell St.	(2)	VS.	Cleveland C.

Mon. July 20,1970

Carver C.	(1)	VS.	St. Jude
Boys C.	(2)	VS.	Washington P.
Barber H.	(3)	VS.	Houston Hill

Wed. July 22, 1970

Bell St.	(2)	VS.	Washington P.
Gibbs Village	(3)	VS.	Cleveland Ct.
Dexter Ave.	(1)	VS.	Vineyard

Sat. July 25, 1970

Carver	(1)	VS.	Boys Club
Sheridan H.	(2)	VS.	Freehold Ct.

PLAY-OFF 2-3

U. S. DIST. COURT - MIDDLE DIST. - ALA.
PLAINTIFF'S EXH 39 (p.2)

Page Ex 40

ATHLETIC PROGRAM

BASEBALL TEAMS

40 Dixie Youth League Teams — white
15 Babe Ruth Teams — white
8 Senior Baby Ruth Teams — white
8 Semi Pro Teams — white
30 Dixie Youth League Farm Teams — white
12 Little League Teams — Black
3 Pony League Teams — Black

SOFTBALL TEAMS

60 Men and Boys' Teams
8 Women's Teams
12 Jr. High Girls' Teams
8 Girls' - 12 and Under Teams

BASEBALL LIGHTED FIELDS

Babe Ruth League Fields

Bellingrath — Cloverdale
Chisholm — Morningview
Donnelly — Goodwyn
Boys' Club

Little League Fields

Houston Hill — Carver

Babe Ruth and Senior Baby Ruth Fields

Bellingrath — Goodwyn
Chisholm — Carver

SOFTBALL LIGHTED FIELDS

Boys' Club — Sands Street
Carver — Houston Hill
Chisholm (2) — Highland Gardens
Johnson Colonial — Dent Montgomery Bishops

PRACTICE FIELDS

BABE RUTH & SR. BABE RUTH PRACTICE FIELDS

Bellingrath — Capital Heights
Cloverdale — Huntingdon College
Carver — Alabama Christian College
McIntyre

SOFTBALL PRACTICE FIELDS

Mag Hill — Hayneville Road
Cloverdale — Capital Heights (2)
Highland Gardens

FOOTBALL TEAMS

12 Jr. High Varsity Teams
12 Jr. High B-Teams
6 Jr. High C-Teams

BASKETBALL TEAMS

12 Jr. High Varsity Teams
12 Jr. High B-Teams
6 Jr. High C-Teams

Civo-Kids Basketball

6 13 Years and Under Teams
6 14 Years and Under Teams
6 17 Years and Under Teams

TRACK TEAMS

12 Jr. High Varsity Teams
6 Jr. High B-Teams
6 Jr. High C-Teams

Annual Cross Country Track Meet - For All Bellingrath Community Center

6 Jr. High Varsity Teams

FOOTBALL FIELDS

McIntyre — Highland Gardens
Hayneville Road — Chisholm
Houston Hill — E.T. Washington
Carver — Bellingrath
Hunter Hall — Capital Heights
Cloverdale — Floyd
Goodwyn

SOCCER TEAMS

Floyd Community Center — Cloverdale Community Center

WRESTLING TEAMS

6 Jr. High Varsity Teams

TENNIS TEAMS

6 Jr. High Varsity Teams

GOLF TEAMS

6 Jr. High Varsity Teams

TRACK FIELDS

Lee High School — Sanier High School

U. S. DIST. COURT - MIDDLE DIST. - ALA.

PLAINTIFF'S EXH. 40

Plaintiff's Exhibit 43

...ending recommendations based on the findings of the professional ... committee and subject to the approval of the YMCA-City Recreation ... Coordination Committee are designed to serve as a guide for both agencies ... planning and planning their athletic programs. It has been an attempt ... unnecessary duplication and over-lapping. It is the objective ... recommendations to best serve the people of Montgomery and to ... of our responsibilities particularly in the areas of city and ... building. Citizens Efforts - Out of town - City wide - all sports

...ITIES: In 1958 the Y.M.C.A. and City Recreation Department ... 4500 boys on 90 competitive teams. The fields were operated by ... City Recreation Department

...n High Football -- A competitive league for Varsity and "B" teams ... played in the local junior high schools. City Recreation on Junior ... School fields.

...ight Football -- League for boys who are 13 and under and ... no more than 135 pounds.# Recreation Department on playgrounds

...ee Football -- League for boys who are 12 years old and under and ... no more than 85 pounds.# YMCA on school fields and playgrounds

Termite Football -- League for boys who are 10 years old and under and weigh no more than 70 pounds.# YMCA on school grounds and playgrounds

(# Special weight allowances for younger boys)

An earlier effort at co-ordination has produced this very workable program which covers all age groups and certainly meets the needs of all boys interested in football.

Combat Basketball Table.

2 ...KETBALL: In 1957 the Y.M.C.A. and City Recreation Department ... 1120 boys on 112 teams in competitive basketball.

17 & Under -- One league under the City Recreation to be played in the afternoon during the week. One league under the YMCA to practice during the week and play on Monday nights. Boys will not be encouraged to play in both leagues.

...15 & Under -- City wide leagues will be under the YMCA. Recreation ...ay offer non-conflicting intramural leagues within the community centers.

...r High Varsity -- City Recreation will have a varsity league and a ...B" league. It is recommended that varsity and B" teams be limited to ten players. This will turn loose more boys to participate in other ...ies. In no case shall a varsity team carry more than twelve men

13 & Under -- The Y.M.C.A. and City Recreation will each operate a non-conflicting league for this age group. Intramurals in the centers may be run on a non-conflicting basis.

12 & Under -- The Y.M.C.A. will operate a city wide league for this age group. Limited to third grade.

Elementary --- The YMCA will operate city-wide elementary school basketball leagues with practices scheduled at the YMCA. The Recreation Department may offer a league on the community level for those boys not reached by the "Y". The "Y" leagues will be on a 4th, 5th, and 6th. grade level.

Note --- Both the City Recreation and the YMCA will operate a zone basketball league with rules adopted to co-ordinate and two programs.

VOLLEYBALL: In 1957 the YMCA served 168 men on 9 teams in competitive ...ball. With the addition of new facilities it is hoped that ...ipation in this activity will rapidly increase.

Civic Club Volleyball -- YMCA
...s of Volleyball -- YMCA
...r League Volleyball -- YMCA and City Recreation
...Volleyball -- Establish...

U. S. DIST. COURT - MIDDLE DIST. - ALA.

PLAINTIFF'S EXH 43

BASEBALL: The City Recreation Department through the cooperation of the Little League, Babe Ruth, and American Legion officials served [illegible] boys on 38 teams in baseball last year.

Little League -- City Recreation and Little League officials Boys 12 & under.

[illegible] League -- City Recreation for boys who did not qualify for Little League

Babe Ruth League -- City Recreation and Babe Ruth officials for boys 15 and under.

13-year-old League -- City Recreation for boys not making Babe Ruth League.

American Legion -- City Recreation and American Legion for boys 18 and under.

SOFTBALL The YMCA and City Recreation Department served 850 men, women, and boys on 46 teams in 1958

Elementary -- YMCA on city fields. League to begin in late March and be completed by May 1st.

Men's Leagues -- City Recreation

Civic League -- YMCA on City Recreation fields.

Women's League -- City Recreation

6 TRACK: The City Recreation Department in cooperation with civic clubs, state high school athletic association, and local junior and senior high school co-sponsors invitational, sectional, and state track meets for colleges, high schools, and junior high schools. Members of the YMCA staff will assist in officiating upon request.

Junior High Track -- City Recreation

Elementary -- No planned program. Would be under joint sponsorship of "Y" and City Recreation if program were initiated.

7 AQUATICS: In 1958 the YMCA served from 2000 to 2400 boys, girls, men, and women in organized swimming.

Life saving and water safety courses -- YMCA

Learn-to-swim -- City wide program under the auspices of the YMCA and Alabama Journal. If additional pools become available and additional finances and staff are needed the City will assist the YMCA in meeting this demand if possible.

Competitive swimming and diving -- The YMCA will sponsor competitive swim teams and meets including the City Open Championship. A representative team under joint sponsorship of the YMCA and City Recreation may participate in the State Recreation Meet.

Special Events: The YMCA will offer its pools whenever possible to the Community Centers' staffs for special activities

8 OTHER SPORTS: (BADMINTON, WRESTLING, JUDO, GYMNASTICS) will be offered by the Recreation Department and the YMCA. As these programs grow it will be the responsibility of this committee to see that they best serve the people of our community and are co-ordinated to this end.

Weight lifting and body building -- Representative from from Downtown [illegible]

Handball -- Downtown "Y".

Respectfully submitted,

Henry Andrews
[illegible]

U. S. DIST. COURT - MIDDLE DIST. - ALA.

PLAINTIFF'S EXH 43 (p. 2)

August 23, 1965

Mr. Henry Andrews
City Recreation Department
City Hall
Montgomery, Alabama

Dear Mr. Andrews:

Enclosed is a draft outlining the purposes of our Co-ordinating Committee. I feel that it is important that you and I, with the other key people on our staffs, make such changes as necessary prior to the meeting with all of the staff members for both organizations.

Carl Bear will serve as the Chairman of the Y.M.C.A. Co-ordinating Committee and the other committee members will be:

Dave Lerum — Flynn Murphy
Streeter Hiett — Hugh Stallings

Sincerely,

William G. Chandler
General Secretary

WGC/ab

enclosure

cc: Mayor Earl James

U. S. DIST. COURT - MIDDLE DIST. - ALA.

PLAINTIFF'S EXH. 46

It's Not What You Say About

SEGREGATION

IT'S WHAT YOU

DO ABOUT IT

THAT COUNTS!!

Let's Read The Record Of The Past Four Years

Fighting All Our Battles From A Defensive Position

No Aggressive Program

THE REISSUING OF A BUS FRANCHISE TO A CORPORATION CONTROLLED BY STOCKHOLDERS OUTSIDE MONTGOMERY AT A CRITICAL TIME AND FOR 10 YEARS.

LACK OF ORGANIZATION IN HANDLING THE BUS BOYCOTT

LACK OF ACTION AGAINST THE CAR POOL

EARL JAMES HAS THE PERSONAL COURAGE TO

Fight For Segregation!

Elect

EARL JAMES for Mayor

U. S. DIST. COURT - MIDDLE DIST. - ALA.

PLAINTIFF'S EXH 162

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

GILMORE ET AL. *v.* CITY OF MONTGOMERY, ALABAMA, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 72-1517. Argued January 15-16, 1974—Decided June 17, 1974

Petitioners, Negro citizens of Montgomery, Ala., brought this class action in 1958 to desegregate the city's public parks, and in 1959 the District Court ordered the parks desegregated. The Court of Appeals affirmed, and ordered the District Court to retain jurisdiction. Thereafter, however, segregated recreational programs were continued by the city in cooperation with the YMCA, public swimming pools were closed allegedly to prevent the mixing of races, and recreational facilities in Negro neighborhoods were not maintained equally with those in white neighborhoods. The petitioners by motion in 1970 reopened the litigation based on facts developed in *Smith* v. *YMCA*, 316 F. Supp. 899 (MD Ala. 1970), in which relief was obtained against the "coordinated effort" of the city and the YMCA to perpetuate the segregated parks. The claims raised by the 1970 motion were settled by agreement. In 1971 the petitioners filed the "Motion for Supplemental Relief," which forms the basis for the present phase of the litigation, complaining that the city was permitting racially segregated schools and other segregated private groups and clubs to use city parks and recreational facilities. The District Court enjoined the city and its officials from permitting or sanctioning the use of city recreational facilities by any racially segregated private school or affiliated group, or by any private nonschool group, club or organization that has a racially discriminatory admissions policy. The Court of Appeals sustained the injunction insofar as the use of city facilities by segregated private schools was "exclusive" and not in common with other citizens, but reversed the injunction as it applied to "nonexclusive" use by segregated private schools and to use by nonschool groups. The

Syllabus

court found an insufficient threat to desegregated public education to support an injunction restraining nonexclusive use by private school groups, and no "symbiotic relationship" between the city and nonschool groups so that the injunction impermissibly intruded upon the freedom of association of citizens who were members of such groups. *Held:*

1. The city was properly enjoined from permitting exclusive access to its recreational facilities by segregated private schools and by groups affiliated with such schools. Pp. 7–10.

(a) Using the term "exclusive use" as implying that an entire facility is exclusively, and completely, in the possession, control, and use of a private group, and as also implying, without mandating, a decisionmaking role for the city in allocating such facilities among private and public groups, the city's policy of allocating facilities to segregated private schools, in the context of the 1959 order and subsequent history, created, in effect, "enclaves of segregation" and deprived petitioners of equal access to parks and recreational facilities. Pp. 7–8.

(b) The exclusive use and control of city recreational facilities, however temporary, by private segregated schools were little different from the city's agreement with the YMCA to run a "coordinated" but, in effect, segregated recreational program. This use carried the brand of "separate but equal" and, in the circumstances of this case, was properly terminated by the District Court. Pp. 8–9.

(c) More importantly, the city's policies operated directly to contravene an outstanding school desegration order, and any arrangement, implemented by state officials at any level, that significantly tends to perpetuate a dual school system, in whatever manner, is constitutionally impermissible. Pp. 9–10.

2. On the record, it is not possible to determine whether the use of the city's recreational facilities by private school groups in common with others, and by private nonschool organisations, involved the city so directly in the actions of those users as to warrant court intervention on constitutional grounds. Pp. 11–15.

(a) The record does not contain sufficient facts upon which to predicate legal judgment as to whether certain uses of city facilities in common by private school groups or exclusively or in common by nonschool groups contravened the parks desegregation order, or the school desegregation order, or in some way constitute "state action" ascribing to the city the discriminatory actions of the groups in question. P. 11.

Syllabus

(b) The portion of the District Court's order prohibiting the mere use of city recreational facilities by *any* segregated "private group, club or organization" is invalid because it was not predicated upon a proper finding of state action. *Moose Lodge No. 107* v. *Irvis*, 407 U. S. 163, distinguished. Pp. 13–14.

473 F. 2d 832, reversed in part, and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, POWELL, and REHNQUIST, JJ., joined. MARSHALL, J., filed an opinion concurring in part and dissenting in part. BRENNAN, J., filed an opinion concurring in the judgment. WHITE, J., filed an opinion concurring in the judgment, in which DOUGLAS, J., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 72–1517

Georgia Theresa Gilmore et al., Petitioners, *v.* City of Montgomery, Alabama, et al. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June 17, 1974]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

The present phase of this prolonged litigation concerns the propriety of a federal court's enjoining a municipality from permitting the use of public park recreational facilities by private segregated school groups and by other non-school groups that allegedly discriminate in their membership on the basis of race. We granted certiorari to consider this important issue. 414 U. S. 907 (1973).

I

Petitioners are Negro citizens of Montgomery, Alabama. In December 1958, now over 15 years ago, they instituted this class action to desegregate Montgomery's public parks. The defendants are the city, its Board of Commissioners and the members thereof, the Parks and Recreation Board and its members, and the Superintendent of the Parks and Recreational Program.

By their original complaint, the petitioners specifically challenged, on Fourteenth Amendment due process and equal protection grounds, a Montgomery ordinance (No. 21–57, adopted June 4, 1957) which made it a misdemeanor, subject to fine and imprisonment, "for white and colored persons to enter upon, visit, use or in any way

occupy public parks or other public houses or public places, swimming pools, wading pools, beaches, lakes or ponds except those assigned to their respective races." Both declaratory and injunctive relief were requested.[1] On September 9, 1959, the District Court entered its judgment that the ordinance was unconstitutional and enjoined the defendants from enforcing the ordinance "or any custom, practice, policy or usage which may require plaintiffs, or any other Negroes similarly situated, to submit to enforced segregation solely because of race or color in their use of any public parks owned and operated by the City of Montgomery, Alabama." The judgment was accompanied by a memorandum opinion. 176 F. Supp. 776 (MD Ala. 1959). On appeal, the Fifth Circuit affirmed but ordered the judgment modified to provide that the District Court retain jurisdiction. 277 F. 2d 364, 368 (1960). The trial court, accordingly, ruled that it "will and does hereby retain jurisdiction of this cause until further order." [2]

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[1] Prior to the institution of the suit, some of the plaintiffs had petitioned the City's Parks and Recreation Board, and the plaintiffs and others had petitioned the City's Board of Commissioners to provide access to the city parks for petitioners and all other Negro citizens similarly situated. The Chairman of the Parks and Recreation Board replied that the Board "has no authority in this matter." The Board of Commissioners responded, "The Commission will not operate integrated parks." Exhibits attached to complaint filed December 22, 1958, in Civil Action No. 1490–N, United States District Court for the Middle District of Alabama, Northern Division.

Within days after petitioners filed their suit, the city authorities, by resolution effective January 1, 1959, closed all the city's recreational parks, athletic fields, swimming facilities and playgrounds, to all persons, white and black, and did not purport officially to reopen them until 1965. The city continued, however, to own and maintain them.

[2] On April 22, 1964, after the case had lain dormant for four years, the District Court ordered the file closed "without prejudice to any party to this litigation petitioning this Court for a reinstatement."

In 1970, the petitioners sought to reopen the litigation. They filed a motion asking, among other relief, that the defendants be cited for contempt "for deliberately avoiding and violating this Court's Judgment and Order in this case." [3] The motion contained allegations that some of the municipal parks had been reopened "in such a manner to avoid the total and full integration of said parks"; that the city had conspired with the Montgomery YMCA to segregate swimming and other recreational facilities and programs; that recreational facilities were unequally allocated as between white and Negro neighborhoods; and that the city discriminated in its employment of personnel in recreational programs. The basis for these claims arose from other, separate litigation initiated in 1969 and resulting in the granting of affirmative relief to the plaintiffs in that suit. See *Smith* v. *Young Men's Christian Assn.*, 316 F. Supp. 899 (MD Ala. 1970), aff'd as modified, 462 F. 2d 634 (CA5 1972). In that action the District Court found that the "coordinated effort" of the city and of the YMCA, 316 F. Supp., at 908, and an agreement between them, reached shortly before the closing of the city parks and the entry of the court's 1959 decree, had effectuated "the perpetuation of segregated recreational facilities and programs in the City of Montgomery," *id.*, at 909, and that it was "unmistakably clear that its purpose was to circumvent the Supreme Court's and this Court's desegregation rulings in the area of public recreation." *Id.*, at 908.[4] The District Court concluded:

> "[T]he YMCA, as a result of the cooperative agreement, has been performing a statutorily declared

[3] Petitioners' motion, filed August 7, 1970, was styled as a "Motion to Cite Defendants for Contempt and for Relief." On October 2, the District Court granted the further motion of the petitioners that the August 7 motion be treated as an amendment to the original complaint.

[4] The record in that case revealed a deliberate attempt to thwart

'public function'; the Montgomery Park and Recreation Board has, in effect, transferred some of its statutory authority and responsibility to the YMCA, thereby investing the YMCA with a municipal character; and therefore the YMCA has been serving as a municipal rather than a private agency in assisting the Park Board in providing recreational programs for the city.

. . . . .

"[T]he YMCA's discriminatory conduct denied the plaintiffs their Fourteenth Amendment rights to Equal Protection of the law; under the facts of this case the plaintiffs' showing of 'state action' sat-

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the desegregation order of the District Court. In 1958, the city and the YMCA formed a coordination committee. It was agreed that the YMCA would not offer any program that would duplicate or conflict with one offered by the city's recreation department. The YMCA conducted football, basketball, and track programs for all the elementary school children of the city, but not for the junior high students. The responsibility for administering junior high programs was delegated to the Recreation Department. Each elementary school supposedly was assigned to the nearest YMCA branch. Yet the District Court found that "every predominantly white school in the city is assigned to one of the three all-white branches even though the school may be closer to the Cleveland Avenue [Negro] branch. Every predominantly Negro school is, regardless of its location, assigned to the Cleveland Avenue branch." 316 F. Supp., at 905. The YMCA also was given free use of the city's parks, playgrounds, and lighting equipment for its various athletic programs, and free water for its swimming pools. The city did not reopen its pools after it closed the parks in 1959. "In 1957, the YMCA operated one small branch in downtown Montgomery which had less than 1,000 members. By 1960, two years after the 'Co-ordination Committee' had been created, it operated five branches with five swimming pools. Today the YMCA operates six branches with eight swimming pools and has approximately 18,000 members." *Id.*, at 908.

> isfied the requirement under Title 42, U. S. C. Section 1983 that the YMCA's conduct be 'under color of law.'" 462 F. 2d, at 641–642.

The modification by the Court of Appeals related only to the disapproval of a provision in the District Court's order directing a specific Negro-White ratio in the YMCA's board and executive committee. No review was sought here.

The claims raised by the petitioners in their 1970 motion were settled by agreement dated January 29, 1971.[4] On July 29, the respondents filed their first written progress report. On September 8, the petitioners filed a "Motion for Supplemental Relief." App. 15. This motion forms the basis for the present phase of the litigation. The petitioners complained that the city was permitting racially segregated schools and other segregated private groups and clubs to use city parks and recreational facilities. They requested injunctive relief against "the use of city owned and operated recreational facilities by any private school group, club, or organization which is racially segregated or which has a racially discriminatory admissions policy."

The District Court granted the petitioners the relief they requested. 337 F. Supp. 22 (MD Ala. 1972). The

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[4] The settlement agreement appears to have been aimed at providing equal recreational facilities for the Negro population of Montgomery. It specified the construction of new community centers and a new recreation center. Improvements were to be made to existing predominantly Negro facilities. The city agreed to maintain all community centers "on an equal basis and to the same manner and extent."

The agreement was approved by the District Court on January 29, 1971. Jurisdiction, however, was "specifically retained," and the defendants were ordered to file a written progress report every six months.

court reasoned that Montgomery officials were under an affirmative duty to bring about and to maintain a desegregated public school system. Providing recreational facilities to *de facto* or *de jure* segregated private schools was inconsistent with that duty because such aid enhanced the attractiveness of those schools, generated capital savings that could be used to improve their private educational offerings, and provided means to raise other revenue to support the institutions, all to the detriment of establishing the constitutionally mandated unitary public school system. The court, consequently, enjoined the city and its officials "from permitting or in any way sanctioning the use of city owned or operated recreational facilities by any private school, or private school affiliated group, if such school or group is racially segregated or if it has a racially discriminatory admissions policy." *Id.*, at 26. The court went on, however, with sparse findings and brief discussion, and similarly enjoined the city and its officials from permitting or sanctioning the use of city recreational facilities "by any private group, club or organization which is not affiliated with a private school and which has a racially discriminatory admissions policy." *Ibid.*[4]

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[4] The District Court's decretal provisions in full text, except for a paragraph relating to the taxation of costs, are:

"1. That the City of Montgomery, Alabama's policy and practice of permitting the use of city owned or operated recreational facilities by any private school, or private school affiliated group, which school or group is racially segregated or which has a racially discriminatory admissions policy be and the same is hereby declared unconstitutional.

"2. That said City of Montgomery, Alabama, its officers, agents, servants, employees, and those acting in concert with it, be and each is hereby enjoined from permitting or in any way sanctioning the use of city owned or operated recreational facilities by any private school, or private school affiliated group, if such school or group is racially segregated or if it has a racially discriminatory policy.

"3. That said City of Montgomery, Alabama's policy and practice

On appeal, the Court of Appeals reversed in part and remanded the case with directions. 473 F. 2d 832 (CA5 1973). It sustained that part of the injunction which restrained the use of city facilities by segregated private schools when that use was "exclusive" and not in common with other citizens. *Id.*, at 837. The court ruled, however, that "nonexclusive enjoyment" of those facilities by private school children "was not proven to present a sufficient threat to desegregated public education to support an injunction restraining the clear personal right of the affected children to enjoy such usage in common with the rest of the public." *Ibid.* With respect to that portion of the District Court's order concerning other private nonschool groups, the Court of Appeals held that there was no "symbiotic relationship" of the kind present and condemned in *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715 (1961). Consequently, it held that under *Moose Lodge No. 102* v. *Irvis*, 407 U. S. 163 (1972), that portion of the District Court's order dealing with nonschool groups must be reversed because the injunction impermissibly intruded upon the freedom of association of citizens who were members of private groups. The court, accordingly, ordered deletion of certain paragraphs of the injunctive order and the clarification of others. 473 F. 2d, at 839–840. The District Court com-

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of permitting the use of city owned or operated recreational facilities by any private group, club or organization which has a racially discriminatory admissions policy be and the same is hereby declared unconstitutional.

"4. That said City of Montgomery, Alabama, its officers, agents, servants, employees and those acting in concert with it, be and each is hereby enjoined from permitting or in any way sanctioning the use of city owned or operated recreational facilities by any private group, club or organization which is not affiliated with a private school and which has a racially discriminatory admissions policy." 337 F. Supp., at 26.

plied with that mandate and, in particular, added the following paragraph to its injunctive order:

> "The injunction issued by this Court does not prohibit the City of Montgomery from permitting non-exclusive access to public recreational facilities and general government services by private schools or school affiliated groups."

The plaintiffs petitioned for certiorari; the defendants did not cross-petition.

II

The Equal Protection Clause of the Fourteenth Amendment does not prohibit the "[i]ndividual invasion of individual rights." *Civil Rights Cases*, 109 U. S. 3, 11 (1883). It does proscribe, however, state action "of every kind" that operates to deny any citizen the equal protection of the laws. *Ibid.* This proscription on state action applies *de facto* as well as *de jure* because "[c]onduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action." *Evans* v. *Newton*, 382 U. S. 296, 299 (1966). In the present case we must determine whether the city of Montgomery engaged in discriminatory activity violative of the parks desegregation order. We must also decide whether the city's involvement in the alleged discriminatory activity of segregated private schools and other private groups, through its providing recreational facilities, constitutes "state action" subject to constitutional limitation.

A

The Court of Appeals affirmed the District Court insofar as the latter enjoined the "exclusive possession of public recreational facilities such as football stadiums,

baseball diamonds, basketball courts, and tennis courts for official athletic contests and similar functions sponsored by racially segregated private schools." 473 F. 2d, at 836–837. The boundaries of this "exclusive" use approach, however, are not self-evident. We find the concept helpful not so much as a controlling legal principle but as a description of a type of use and, in the context of this case, suggestive of a means of allocating public recreational facilities. The term "exclusive use" implies that an entire facility is exclusively, and completely, in the possession, control and use of a private group.[7] It also implies, without mandating, a decision-making role for the city in allocating such facilities among private and, for that matter, public groups.

Upon this understanding of the term, we agree with petitioners that the city's policy of allocating facilities to segregated private schools, in the context of the 1959 parks desegregation order and subsequent history, created, in effect, "enclaves of segregation" and deprived petitioners of equal access to parks and recreational facilities. The city was under an affirmative constitutional duty to eliminate every "custom, practice, policy or usage" reflecting an "impermissible obeisance to the now thoroughly discredited doctrine of 'separate but equal.'" *Watson* v. *Memphis*, 373 U. S. 526, 538 (1963). This obviously meant that discriminatory practices in Montgomery parks and recreational facilities were to be

[7] We understand the term "exclusive use" not to include the situation where only part of a facility may be allocated to or used by a group, even though that allocation or use results in the *pro tanto* exclusion of others. For example, the use of two of a total of 10 tennis courts by a private school group would not constitute an exclusive use; the use of all 10 courts would. This is not to say that the use of two by a private school group would be constitutionally permissible. See discussion, *infra*.

eliminated "root and branch," to use the phrase employed in *Green* v. *County School Board of New Kent County*, 391 U. S. 430, 438 (1968).

Instead of prompt and orderly compliance with the District Court's mandate, however, the city of Montgomery engaged in an elaborate subterfuge to anticipate and circumvent the court's order. Segregated recreational programs continued to be presented through the conveniently cooperating private agency of the local YMCA. All public swimming pools were closed allegedly to prevent the mixing of races. Facilities in negro neighborhoods were not maintained equally with those in white neighborhoods. In light of these facts, made part of the record in this case,[8] it was entirely appropriate for the District Court carefully to scrutinize any practice or policy that would tend to abandon to segregated private groups facilities normally open to members of all races on an equal basis. Here, the exclusive use and control of city recreational facilities, however temporary, by private segregated schools was little different from the city's agreement with the YMCA to run a "coordinated" but, in effect, segregated recreational program. It carried the brand of "separate but equal" and, in the circumstances of this case, was properly terminated by the District Court.

Particularly important is the fact that the city's policies operated directly to contravene an outstanding school desegregation order. See *Carr* v. *Montgomery County Board of Education*, 232 F. Supp. 705 (MD Ala. 1964); 253 F. Supp. 306 (MD Ala. 1966); 289 F. Supp. 647 (MD Ala. 1968), aff'd as modified, 400 F. 2d 1, 402 F. 2d 782, 784,

[8] Petitioners requested that the District Court take notice in this case of *Smith* v. *Young Men's Christian Assn.*, *supra*, in which the same district judge had presided. The trial court ruled from the bench that it would take judicial notice "of the evidence that was presented in the *Y. M. C. A. case*." Excerpted transcript, testimony of William Chandler, November 20, 1970, p. 7.

787 (CA5 1968), reversed and remanded *sub nom. United States* v. *Montgomery County Board of Education*, with directions to affirm the judgment of the District Court, 395 U. S. 225 (1969).[9] Certainly, the city's officials were aware of this order and were responsible for seeing that no actions on their part would significantly impede the progress of school desegregation in the city. *Cooper* v. *Aaron*, 358 U. S. 1 (1958); *Green* v. *County School Board of New Kent County*, 391 U. S., at 437–438; *Alexander* v. *Holmes County Board of Education*, 396 U. S. 19, 20 (1969). Any arrangement, implemented by state officials at any level, which significantly tends to perpetuate a dual school system, in whatever manner, is constitutionally impermissible. "[T]he constitutional rights of children not to be discriminated against . . . can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted 'ingeniously or ingenuously.'" *Cooper* v. *Aaron*, 358 U. S., at 17. This means that any tangible state assistance, outside the generalized services government might provide to private segregated schools in common with other schools, and with all citizens, is constitutionally prohibited if it has "a significant tendency to facilitate, reinforce, and support private discrimination." *Norwood* v. *Harrison*, 413 U. S. 455, 466 (1973). The constitutional obligation of the State "requires it to steer clear, not only of operating the old dual system of racially segregated schools, but also of giving significant aid to institutions that practice racial or other invidious discrimination." *Id.*, at 467.

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[9] Petitioners also requested that the District Court in this case take notice of *Carr* v. *Montgomery County Board of Education*, *supra*. The trial court in its reported opinion, 337 F. Supp., at 24, referred to the duty of the State's school boards to desegregate.

Here, the city's actions significantly enhanced the attractiveness of segregated private schools, formed in reaction against the federal court school order, by enabling them to offer complete athletic programs. The city's provision of stadiums and recreational fields resulted in capital savings for those schools and enabled them to divert their own funds to other educational programs. It also provided the opportunity for the schools to operate concessions that generated revenue. We are persuaded, as were both the District Court and the Court of Appeals, that this assistance significantly tended to undermine the federal court order mandating the establishment and maintenance of a unitary school system in Montgomery. It therefore was wholly proper for the city to be enjoined from permitting exclusive access to public recreational facilities by segregated private schools and by groups affiliated with such schools.

B

Although the Court of Appeals ruled out the *exclusive* use of city facilities by private schools, it went on to modify the District Court order "to make clear that the City of Montgomery is not prohibited from permitting nonexclusive access to public recreational facilities and general governmental services by private schools or school affiliated groups," 473 F. 2d, at 840, or from permitting access to these facilities by private organizations that have a racially discriminatory admissions policy. *Id.*, at 839. Upon this record, we are unable to draw a conclusion as to whether the use of zoos, museums, parks, and other recreational facilities by private school groups in common with others, and by private nonschool organizations, involves government so directly in the actions of those users as to warrant court intervention on constitutional grounds.

It would be improper to determine at this stage the appropriateness of further relief in all the many and varied

situations where facilities are used in common by school groups or used exclusively or in common by private groups. It is possible that certain uses of city facilities will be judged to be in contravention of the parks desegregation order, or the school desegregation order, or in some way to constitute impermissible "state action" ascribing to the city the discriminatory actions of the groups. The record before us does not contain sufficient facts upon which to predicate legal judgments of this kind. The questions to be resolved and the decisions to be made rest upon careful identification of the different types of city facilities that are available and the various uses to which they might be put by private groups.[10]

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[10] The Brethren in concurrence state that they would sustain the District Court insofar as any school-sponsored or directed uses of the city recreational facilities enable private segregated schools to duplicate public school operations at public expense. It hardly bears repetition that the District Court's original injunction swept beyond these limits without the factfinding required for the prudent use of what would otherwise be the raw exercise of a court's equitable power.

It is by no means apparent, as our Brother BRENNAN correctly notes, which uses of city facilities in common with others would have "a significant tendency to faciliate, reinforce, and support private discrimination." *Norwood* v. *Harrison*, 413 U. S. 455, 466 (1973). Moreover, we are not prepared, at this juncture and on this record, to assume the standing of these plaintiffs to claim relief against certain nonexclusive uses by private school groups. The plaintiffs in *Norwood* were parties to a school desegregation order and the relief they sought was directly related to the concrete injury they suffered. Here, the plaintiffs were parties to an action desegregating the city parks and recreational facilities. Without a properly developed record, it is not clear that every nonexclusive use of city facilities by school groups, unlike their exclusive use, would result in cognizable injury to these plaintiffs. The District Court does not have carte blanche authority to administer city facilities simply because there is past or present discrimination. The usual prudential tenets limiting the exercise of judicial power must be observed in this case as in any other.

The difficulties that confront us on this record are readily apparent. Under appropriate circumstances, the District Court might conclude, as it did in the instance of exclusive use by private schools, that access in common to city facilities by private school groups would indeed contravene the school desegregation order. For example, all-white private school basketball teams might be invited to participate in a tournament conducted on public recreational facilities with desegregated private and public school teams. Because "discriminatory treatment exerts a pervasive influence on the entire educational process," *Norwood* v. *Harrison*, 413 U. S., at 469, citing *Brown* v. *Board of Education*, 347 U. S. 483 (1954), such assistance, although proffered in common with fully desegregated groups, might so directly impede the progress of court-ordered school desegregation within the city that it would be appropriate to fashion equitable relief "adjusting and reconciling public and private needs." *Brown* v. *Board of Education*, 349 U. S. 294, 300 (1955). The essential finding justifying further relief would be a showing of direct impairment of an outstanding school desegregation order. *Cooper* v. *Aaron*, 358 U. S., at 17; *Bush* v. *Orleans Parish School Board*, 364 U. S. 500 (1960); *Brown* v. *South Carolina State Board of Education*, 296 F. Supp. 199 (S. C. 1968), aff'd, 393 U. S. 222 (1968); *Poindexter* v. *Louisiana Financial Assistance Comm'n*, 275 F. Supp. 833 (ED La. 1967), aff'd, 389 U. S. 571 (1968); *Lee* v. *Macon County Board of Education*, 267 F. Supp. 458 (MD Ala. 1967), aff'd, *sub nom.* 389 U. S. 215 (1967); *Norwood* v. *Harrison*, *supra*.

Relief would also be appropriate if a particular use constitutes a vestige of the type of state-sponsored racial segregation in public recreational facilities that was prohibited in the parks decree and likewise condemned in *Watson v. Memphis*, 373 U. S. 526

(1963). See also *Dawson* v. *Mayor and City Council of Baltimore City*, 220 F. 2d 386 (CA4), aff'd, 350 U. S. 877 (1955); *Muir* v. *Louisville Park Theatrical Assn.*, 347 U. S. 971 (1954); *Holmes* v. *City of Atlanta*, 350 U. S. 879 (1955); *New Orleans City Park Improvement Assn.* v. *Detiege*, 358 U. S. 54 (1958). For example, the record contains indications that there are all-white private and all-Negro public Dixie Youth and Babe Ruth baseball leagues for children, all of which use city-provided ballfields and lighting, balls, bats, mitts, and other aid. Were the District Court to determine that this dual system came about as a means of evading the parks decree, or of serving to perpetuate the separate but equal use of city facilities on the basis of race, through the aid and assistance of the city, further relief would be appropriate.

The problem of private group use is much more complex. The Court of Appeals relied on *Moose Lodge No. 107* v. *Irvis*, 407 U. S. 163 (1972), in concluding that the use of city facilities by private clubs did not reflect a "symbiotic" relationship between government and those groups as to constitute state action. 473 F. 2d, at 838–839.

We feel that *Moose Lodge* is not fully applicable here. In that case, we generally followed the approach taken in *Burton* v. *Wilmington Parking Authority*, *supra*, where it was stated:

> "Owing to the very 'largeness' of government, a multitude of relationships might appear to some to fall within the Amendment's embrace, but that, it must be remembered, can be determined only in the framework of the peculiar facts or circumstances present." 365 U. S., at 725–726.

In *Moose Lodge* the litigation was directly against a private organization, and it was alleged that the organiza-

tion's racially discriminatory policies constituted state action. We held that there was no state action in the mere fact that the fraternal organization's beverage bar was licensed and regulated by the State. In contrast, here, as in *Burton*, the question of the existence of state action centers in the extent of the city's involvement in discriminatory actions by private agencies using public facilities, and in whether that involvement makes the city "a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment." 365 U. S., at 725. Because the city makes city property available for use by private entities, this case is more like *Burton* than *Moose Lodge*. The question then is whether there is significant state involvement in the private discrimination alleged. *Reitman* v. *Mulkey*, 387 U. S. 369 (1967); *Burton* v. *Wilmington Parking Authority*, *supra*; *Evans* v. *Newton*, 382 U. S. 296 (1966); *Moose Lodge No. 107* v. *Irvis*, *supra*. "The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatever." 407 U. S., at 173. Traditional state monopolies, such as electricity, water, and police and fire protection—all generalized governmental services—do not by their mere provision constitute a showing of state involvement in invidious discrimination. *Norwood* v. *Harrison*, 413 U. S., at 465; *Moose Lodge No. 107* v. *Irvis*, 407 U. S., at 173. The same is true of a broad spectrum of municipal recreational facilities: parks, playgrounds, athletic facilities, amphitheaters, museums, zoos, and the like. *Cf. Evans* v. *Newton*, 382 U. S., at 302. It follows, therefore, that the portion of the District Court's order pro-

hibiting the mere use of such facilities by *any* segregated "private group, club or organization" is invalid because it was not predicated upon a proper finding of state action.

If, however, the city or other governmental entity rations otherwise freely accessible recreational facilities, the case for state action will naturally be stronger than if the facilities are simply available to all comers without condition or reservation. Here, for example, petitioners allege that the city engages in scheduling softball games for an all-white church league and provides balls, equipment, fields and lighting. The city's role in that situation would be dangerously close to what was found to exist in *Burton*, where the city had "elected to place its power, property and prestige behind the admitted discrimination." 365 U. S., at 725. We are reminded, however, that the Court has never attempted to formulate "an infallible test for determining whether the State . . . has become significantly involved in private discriminations" so as to constitute state action. *Reitman* v. *Mulkey*, 387 U. S., at 378. "'Only by sifting facts and weighing circumstances' on a case-by-case basis can a 'nonobvious involvement of the State in private conduct be attributed its true significance.'" *Id.*, quoting *Burton*, 365 U. S., at 722. This is the task for the District Court on remand.

III

We close with this word of caution. It should be obvious that the exclusion of any person or group—all-Negro, all-oriental, or all-white—from public facilities infringes upon the freedom of the individual to associate as he chooses. MR. JUSTICE DOUGLAS emphasized this in his dissent, joined by MR. JUSTICE MARSHALL, in *Moose Lodge*. He observed, "The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also

permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires." 407 U. S., at 179–180. The freedom to associate applies to the beliefs we share, and to those we consider reprehensible. It tends to produce the diversity of opinion that oils the machine of democratic government and insures peaceful, orderly change. Because its exercise is largely dependent on the right to own or use property, *Healy* v. *James*, 408 U. S. 169, 181–183 (1972), any denial of access to public facilities must withstand close scrutiny and be carefully circumscribed. Certainly, a person's mere membership in an organization which possesses a discriminatory admissions policy would not alone be ground for his exclusion from public facilities. Having said this, however, we must also be aware that the very exercise of the freedom to associate by some may serve to infringe that freedom for others. Invidious discrimination takes its own toll on the freedom to associate, and it is not subject to affirmative constitutional protection when it involves state action. *Norwood* v. *Harrison*, 413 U. S., at 470.

The judgment of the Court of Appeals is therefore reversed in part. The case is remanded to that court with directions to remand it in turn to the District Court for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 72-1517

Georgia Theresa Gilmore et al., Petitioners v. City of Montgomery, Alabama, et al.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June 17, 1974]

MR. JUSTICE MARSHALL, concurring in part and dissenting in part.

Although I am in general agreement with the views expressed in my Brother WHITE's opinion, I wish to address certain other considerations which I believe should govern appellate review of the order entered by the District Court in this case. That court, which has an unfortunately longstanding and by now intimate familiarity with the problems presented in this case, issued the supplemental relief at issue here in response to a motion by petitioners bringing to its attention the practice of the city of Montgomery of allowing private schools and clubs with racially discriminatory admissions policies or with segregated memberships to use football facilities maintained at city expense. For all that appears in the record, this practice, and the related practice of allowing private segregated schools and clubs to use baseball fields, basketball courts, and athletic equipment maintained and purchased at city expense, were the only problems before the District Court and the only problems intended to be cured by its supplemental order.

Both the Court of Appeals and this Court, rather than limiting their review of the order in conformity with its intended scope, have sought to project the order to a

wide variety of problems not before the District Court—including so-called nonexclusive access by private school groups or nonschool organizations to zoos, museums, parks, nature walks, and other similar municipal facilities—and to review the order as so projected.

By rendering an advisory opinion on matters never presented to the District Court, the Court of Appeals and this Court have attempted to solve in the abstract problems which, in view, should more appropriately be entrusted in large measure to the sound discretion of the District Court Judge who has lived with this case for so many years and who has a much better appreciation both of the extent to which these other matters are actual problems in the city of Montgomery and of the need for injunctive relief to resolve these problems to the extent they exist.

Since I find the District Court's order a permissible and appropriate remedy for the instances of unconstitutional state action brought to its attention, I would sustain and reinstate its order in its entirety.

SUPREME COURT OF THE UNITED STATES

No. 72–1517

Georgia Theresa Gilmore et al., Petitioners, v. City of Montgomery, Alabama, et al. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June 17, 1974]

MR. JUSTICE BRENNAN, concurring.

The Court today affirms the Court of Appeals' judgment insofar as it affirmed paragraphs 1 and 2 of the District Court's order, *ante*, p. 6, n. 6, as applied to enjoin respondents from permitting private segregated *school* groups to make "exclusive use" of Montgomery's recreational facilities. Unlike the Court, I do not think that remand is required for a determination whether certain "nonexclusive uses" by segregated *school* groups should also be proscribed, for I would also sustain paragraphs 1 and 2 insofar as they enjoin any school-sponsored or directed uses of the city recreational facilities that enable private segregated schools to duplicate public school operations at public expense.

Norwood v. *Harrison*, 413 U. S. 455 (1973), struck down a State program which loaned textbooks to students without regard to whether the students attended private schools with racially discriminatory policies. Finding that free textbooks, like tuition grants to private school students, were a "form of financial assistance inuring to the benefit of the private schools themselves," *id.*, at 464, *Norwood* held that the State could not, consistent with the Equal Protection Clause, grant aid that had "a significant tendency to facilitate, reinforce, and support private

discrimination." *Id.*, at 466. The reasoning of *Norwood* compels the conclusion that Montgomery must be enjoined from providing any assistance which financially benefits Montgomery's private segregated *schools*, except, of course, "such necessities of life as electricity, water, and police and fire protection," *Moose Lodge No. 107* v. *Irvis*, 407 U. S. 163, 173 (1972). The unconstitutionality is thus obvious of such "nonexclusive uses" of municipal recreational facilities as the use of a portion of a park for a segregated school's gym classes or organized athletic contests. By making its municipal facilities available to private segregated schools for such activities, Montgomery unconstitutionally subsidizes its private segregated schools by relieving them of the expense of maintaining their own facilities.

Whether it is necessary to go even further and enjoin all school-sponsored and directed nonexclusive uses of municipal recreational facilities—as would my Brothers WHITE and DOUGLAS—is a question I would have the District Judge decide on remand. Private segregated schools are not likely to maintain their own zoos, museums, or nature walks. Consequently, permitting segregated schools to take their students on field trips to city facilities of that kind would not result in a direct financial benefit to the schools themselves. An injunction against use by segregated-schools of such city facilities would be appropriate, in my view, only if the District Court should find that the relief is necessary to insure full effectuation of the Montgomery desegregation decrees.

I agree with the Court's vacation of the Court of Appeals' judgment reversing paragraphs 3 and 4 of the District Court's order relating to segregated *nonschool* groups, and with the direction to the Court of Appeals to enter a new judgment remanding the case to the District Court for further proceedings as to *nonschool* groups. A remand is required, in my view, because first the Dis-

trict Court must consider whether, for purposes of relief supplementary to the 1959 parks desegregation decree, a distinction between simply all-white groups and all-white groups with a segregated admissions policy is proper, *ante*, pp. 6–7 n. 6, and second, if that distinction is found meaningful, the District Court must clarify what evidence was relied upon to conclude that private organizations with racially discriminatory admissions policies are in fact using municipal facilities.*

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*My examination of the record reveals: On December 1, 1971, the parties had filed an "Agreement for Submission of Case," reciting that they agreed "for the case to be submitted to the Court on the pleadings filed by the parties, the answers to interrogatories heretofore filed by the parties, the answers to interrogatories heretofore filed by Defendants, and upon the Fact Stipulation as attached hereto." The only interrogatories propounded in connection with the "Motion for Further Relief," with which this action was commenced, were propounded to respondent Henry M. Andrews, Jr., Superintendent of the Parks and Recreational Program, and neither his answers nor anything contained in the Fact Stipulation, address a practice of respondents with respect to the use of facilities by nonschool private clubs and groups. There is, however, testimony on that subject in the depositions of the several respondents taken in an earlier proceeding on the amended complaint that had led to a settlement agreement. Testimony as to the use of facilities by an allegedly private segregated citywide Dixie Youth baseball league appears in the depositions of Joseph E. Marshall and Durwood Lynn Boseman, the City's Athletic Supervisor. Mr. Marshall's deposition states that, while the Dixie Youth teams at one time were officially segregated, they removed racial restrictions a number of years ago "[r]ealizing that many of [the] leagues used municipal facilities" and that invitations to join the leagues are issued to all children in the public schools, though all of the directors of the leagues are white. Mr. Bozeman's deposition testifies that the city supplies these leagues with playing facilities, pays for lighting, and gives each of them a dozen balls, chest protectors, leg guards, masks, mitts, and eight bats. Mr. Bozeman's deposition also covers the operations of the private, allegedly predominately white, Babe Ruth league and a public Negro Babe Ruth league, and discusses the operations of allegedly segregated church softball leagues.

But, should the District Court on remand find adequate evidence of use of the city's recreational facilities by private *nonschool* groups with segregated admissions policies, or find that the distinction between such groups and simply all-white groups is improper, I believe that the District Court must enjoin "exclusive use" of recreational facilities by such groups. The complete record compiled in this case establishes beyond question that, even after the parks desegregation order of September 9, 1959, respondents continued for over a decade to engage in an unconstitutional *de jure* policy of deliberate segregation of the city's recreational facilities. The Court's reasoning in affirming the Court of Appeals' injunction against "exclusive use" of municipal recreational facilities by private segregated *school* groups demonstrates this and bears repetition:

> "[T]he city's policy of allocating facilities to segregated private schools, in the context of the 1959 parks desegregation order and subsequent history, created, in effect, 'enclaves of segregation' and deprived petitioners of equal access to parks and recreational facilities. The city was under an affirmative constitutional duty to eliminate every '"custom, practice, policy or usage"' reflecting an '"impermissible obeisance to the thoroughly discredited doctrine of separate but equal. . . ."' This obviously meant that discriminatory practices in Montgomery parks and recreational facilities were to be eliminated '"root and branch"' to use the phrase employed in *Green* v. *County Board of New Kent County*, 391 U. S. 430, 438 (1968)." *Ante*, pp. 9–10.

Surely, respondents failure to extirpate "enclaves of segregation" created by "exclusive use" of city recreational facilities by private *nonschool* groups is no less a violation of the city's affirmative duty to desegregate the

parks than its proven failure to eliminate "enclaves" created by the "exclusive use" of such facilities by *school* groups. Thus, unlike the Court, I see no reason for deferring an immediate expression on the significance of the city's involvement in the private discrimination of the nonschool groups, see *ante*, p. 17, pending a more fully developed factual record. The justifications for finding that "exclusive use" by *school* groups violated the 1959 parks desegregation order plainly also require that, if private *nonschool* groups are in fact making "exclusive use" of municipal facilities, these uses, too, be found to violate the 1959 decree. In that circumstance, the unconstitutional "state action" of the respondents consists of their continuing racially discriminatory policies and practices that frustrate and impede the dismantlement of Montgomery's *de jure* segregated parks.

SUPREME COURT OF THE UNITED STATES

No. 72–1517

Georgia Theresa Gilmore et al., Petitioners, *v.* City of Montgomery, Alabama, et al.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June 17, 1974]

MR. JUSTICE WHITE, with whom MR. JUSTICE DOUGLAS joins, concurring.

I concur in the Court's judgment except that I would sustain the District Court not only to the extent the Court of Appeals affirmed its judgment but also insofar as it would bar the use of city-owned recreation facilities by students from segregated schools for events or occasions that are part of the school curriculum or organized and arranged by the school as part of its own program. I see no difference of substance between this type of use and the exclusive use that the majority agrees may not be permitted consistent with the Equal Protection Clause.

It may be useful also to emphasize that there is very plainly state action of some sort involved in the leasing, rental or extending the use of scarce city-owned recreation facilities to private schools or other private groups. The facilities belong to the city, an arm of the State; the decision to lease or otherwise permit the use of the facilities is deliberately made by the city; and it is fair to assume that those who enter into these transactions on behalf of the city know the nature of the use and the character of the group to whom use is being extended. For Fourteenth Amendment purposes, the question is not whether there is state action but whether the con-

ceded action by the city, and hence by the State, is such that the State must be deemed to have denied the equal protection of the laws. In other words, by permitting a segregated school or group to use city-owned facilities, has the State furnished such aid to the group's segregated policies or become so involved in them that the State itself may fairly be said to have denied equal protection? Under *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715 (1961), it is perfectly clear that to violate the Equal Protection Clause the State itself need not make, advise or authorize the private decision to discriminate that involves the State in the practice of segregation or would appear to do so in the minds of ordinary citizens.